

V

Vol. IV

TRANSCRIPT OF RECORD

(Pages 943 to 1269)

Supreme Court of the United States

OCTOBER TERM, 1955

No. 323

UNITED STATES OF AMERICA, EX REL. DAVID
DARCY, PETITIONER,

vs.

EARL D. HANDY, WARDEN OF BUCKS COUNTY
PRISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 15, 1955

CERTIORARI GRANTED OCTOBER 24, 1955

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Volume IV

(2)

EXHIBITS.

(a)

Relator's Exhibits

RELATOR'S EXHIBIT No. 10(a).

OYER AND TERMINER CRIMINAL DOCKET,
BUCKS COUNTY, 1943,

(Page 329).

MAY TERM A. D. 1948.

BUCKS COUNTY, SS.

IN THE NAME AND BY THE AUTHORITY OF THE
COMMONWEALTH OF PENNSYLVANIA

HONORABLE HIRAM H. KELLER PRESIDENT OF THE SEVENTH JUDICIAL DISTRICT, CONSISTING OF THE COUNTY OF BUCKS, BY VIRTUE OF SAID OFFICE, JUSTICE OF THE COURTS OF QUARTER SESSIONS OF THE PEACE AND OYER AND TERMINER AND GENERAL JAIL DELIVERY, FOR THE TRIAL OF CAPITAL AND OTHER OFFENSES IN AND FOR THE SAID COUNTY:

TO THE CLERK OF THE COURTS OF QUARTER SESSIONS OF THE PEACE, AND OYER AND TERMINER AND GENERAL JAIL DELIVERY OF THE COUNTY OF BUCKS, GREETING:

WE ORDER AND DIRECT THAT YOU ISSUE A VENUE TO THE SHERIFF AND JURY COMMISSIONERS OF BUCKS COUNTY, AFORESAID, COMMANDING THE SAID SHERIFF AND JURY COMMISSIONERS TO EX-PANEL, AND THE SAID SHERIFF TO SUMMON, A TRAVERSE JURY IN THE COURTS OF QUARTER SESSIONS OF THE PEACE AND OYER AND TERMINER AND GENERAL JAIL DELIVERY, CONSISTING OF 120 QUALIFIED ACCORDING TO LAW, TO MAKE UP THE JURY REQUISITE TO INQUIRE OF AND PERFORM ALL THOSE THINGS ON OUR PART SHALL BE ENJOINED UPON THEM, AT THE TERM THEREOF TO BE HELD AT DOYLESTOWN, IN AND FOR THE COUNTY OF BUCKS, COMMENCING ON THE 17 DAY OF MAY A. D. 1948, NEXT AFTER THE DATE OF THIS PRECEPT, TO SERVE FOR THE TERM THEREOF COMMENCING ON THE 24 DAY OF MAY A. D. 1948, DATED AT DOYLESTOWN, THIS 12 DAY OF APRIL A. D. 1948.

HIRAM H. KELLER

L.S.

PRESIDENT JUDGE

CALVIN S. BOYER

L.S.

JUDGE.

1948 MAY 24—COURT CALLED AT 10 O'CLOCK A. M.
HON. HIRAM H. KELLER, P.J. AND HON. CALVIN
S. BOYER, J. PRESIDING.

EO DIE—LIST OF TRAVERSE JURORS SUMMONED
AND RETURNED BY THE SHERIFF TO THE MAY
TERM OF CRIMINAL COURT A. D. 1948.

1. GEORGE O. ADAMS 2. JOHN ARTIM 3. JACK EU-
GENE ALBERT 4. FANNIE H. ACUFF 5. HENRY
LOUIS BERGER 6. L. MAY BRABENDER 7. JOHN F.
BRADY 8. MARIAN S. BURTON 9. HELEN M. BOD-
LEY 10. MANASS B. BARNDT 11. JOHN T. CLANCY
12. GEORGE R. COLVILLE 13. SARAH F. COOPER 14.
ARTHUR CLARK 15. WILMER CRESSMAN 16. WIL-
LIAM COATES 17. HARRIET C. CONKLIN 18. W. EARL
CLEVENSTINE 19. SARAH CAVIN 20. PARKER DEHN
21. RAYMOND DAGER 22. WATSON S. DUDLEY 23.
WALTER L. DILLIPLANE 24. JENNIE V. DIEHL 25.
WALTER F. DELASHMUTT 26. KENNARD W. DUNGAN
27. EDNA M. DIXON 28. CATHARINE W. DANSER 29.
GERTRUDE A. EVERETT 30. GEORGE D. EDWARDS
31. J. WARDELL ETTINGER 32. JACOB F. FOSTER
33. CHESTER A. FOULKE 34. T. SAMUEL FLEMING
35. ROSE T. FOY 36. J. PAUL FRANK 37. CHARLES
Z. FRIES 38. FRANK C. GUTEKUNST 39. LILLIAN N.
GERHART 40. DANIEL GUZMICH 41. WILLIAM GAR-
RETT 42. DORA GROFF 43. WILLIAM F. GROOM
(NON EST) 44. AUGUSTA GILL 45. JOHN M. HEM-
PHILL 46. LILLIAN HARRIS 47. MILDRED M.
HOLBERT 48. ROBERT B. HENRY 49. GEORGE D.
HACKETT 50. LOUIS H. HONEGGER 51. GEORGE S.
HAVENS 52. GERTRUDE F. HALL (NON EST) 53.
JOSEPH M. HILLEGAS 54. GEORGE F. HALLOCK

Relator's Exhibit No. 10 (b)

(MORT EST) 55. KATHRYN HOGG 56. ARTHUR HORTON 57. MARGARET E. HILGENDORFF 58. DOROTHY H. IRELAND 59. AGNES B. JEFFERSON 60. CATHERINE C. KRIKORY 61. WILHELMINA B. KLEIN 62. WALTER W. KUEMERLE 63. HELEN J. KOEHLER 64. MILDRED B. KRAMER 65. HELEN KLINE 66. CHARLES W. KIRK

RELATOR'S EXHIBIT No. 10(b).

OYER AND TERMINER CRIMINAL DOCKET,
BUCKS COUNTY, 1943,
(Page 330).

MAY TERM A. D. 1948

67. RAYMOND S. KNIGHT 68. HERBERT P. KUGLER
69. MARIE MILLER LIGHTCAP 70. RUBY LUNKENS
71. JANETTE LAINE 72. ELIZABETH M. LUFF 73.
CLARA H. LUCKENBILL 74. MARIAN L. MASTON
75. RALPH R. MOYER 76. CARRIE M. MECK 77. ALME
T. MEISSNER 78. GERTRUDE A. MILLER 79. ALLEN
G. MOYER 80. MARY B. MORRIS 81. HAROLD K. MIL-
LIKEN 82. FREDERICK C. MORRELL 83. HARVEY S.
MOYER 84. OSWIN M. NASE 85. WILLIAM K. NICE
86. FLORENCE ORGILL 87. AARON S. OVERPECK
88. MADELON L. PRICE 89. TITUS PFLEIGER 90.

ALICE L. PICKETT 91. ESTHER P. PICKERING 92.
MERTON RINIKER 93. SOL SCHACHTER 94. WILSON
R. SWALLOW 95. STANLEY SAMES 96. GEORGE W.
SHELLY 97. LOUISE SALTZMAN 98. CHARLES M.
STRUNK 99. ERNEST E. SCHUMANN 100. GEORGE
S. SCHMELL 101. JULIA SOLLIDAY 102. MILDRED
SHARRETT 103. REED M. SINE (MORT EST) 104.
J. NORMAN VANARTSDALEN 105. HERMAN VAN
KIRK 106. KENT VANDEGRIFT 107. ELSIE P. VAN
VOSSEN 108. WALTER F. WEBBER 109. LLOYD J.
WEIERBACH 110. ANNA J. WILLIAMS 111. ALVIN
B. WORTHINGTON 112. HELEN M. WIDMER 113.
MABEL L. WEISS 114. HAROLD Z. WINDER 115. WIL-
LIAM WILLIAMS 116. HARVEY D. WEISEL 117. JAMES
H. WOOD 118. MARTIN R. WAGNER 119. JOHN E.
WRIGHT 120. JOHN L. M. YARDLEY

EO DIE—THE TRAVERSE JURORS BEING CALLED,
ALL ANSWERED TO THEIR NAMES BUT THE
FOLLOWING:

HENRY LOUIS BERGER; JOHN T. CLANCY; W.
EARL CLEVENSTINE; SARAH CAVIN; WATSON S.
DUDLEY; WALTER F. DELASHMUTT; EDNA M.
DIXON; FRANK C. GUTEKUNST; LILLIAN N. GER-
HART; DORA GROFF; WILLIAM F. GROOM;
GEORGE D. HACKETT; GERTRUDE F. HALL;
GEORGE F. HALLOCK; DOROTHY H. IRELAND;
HELEN KLINE; HERBERT P. KUGLER; MARIE
MILLER. LIGHTCAP; CLARA H. LUCKENBILL;
RALPH R. MOYER; ALLEN G. MOYER; HAROLD K.
MILLIKEN; FREDERICK C. MORRELL; ESTHER P.
PICKERING; SOL SCHACHTER; WILSON R. SWAL-
LOW; GEORGE W. SHELLY; MILDRED SHARRETT;
REED M. SINE; KENT VANDEGRIFT; ANNA J. WIL-
LIAMS; HELEN M. WIDMER; WILLIAM WIL-
LIAMS; AND JOHN L. M. YARDLEY.

RELATOR'S EXHIBIT No. 10(c).

OYER AND TERMINER CRIMINAL DOCKET,
BUCKS COUNTY, 1943.

(Page 331).

MAY TERM A. D. 1948

BUCKS COUNTY, SS.

IN THE NAME AND BY THE AUTHORITY OF THE
COMMONWEALTH OF PENNSYLVANIA

HONORABLE HIRAM H. KELLER PRESIDENT OF
THE SEVENTH JUDICIAL DISTRICT, CONSISTING OF
THE COUNTY OF BUCKS, BY VIRTUE OF SAID OF-
FICE, JUSTICE OF THE COURTS OF QUARTER SES-
SIONS OF THE PEACE AND OYER AND TERMINER
AND GENERAL JAIL DELIVERY FOR THE TRIAL OF
CAPITAL AND OTHER OFFENSES, IN AND FOR THE
SAID COUNTY.

TO THE CLERK OF THE COURTS OF QUARTER SES-
SIONS OF THE PEACE, AND OYER AND TER-
MINER AND GENERAL JAIL DELIVERY OF THE
COUNTY OF BUCKS, GREETING:

WE ORDER AND DIRECT THAT YOU ISSUE A
VENIRE TO THE SHERIFF AND JURY COMMISSION-

ERS OF BUCKS COUNTY, AFORESAID, COMMANDING THE SAID SHERIFF AND JURY COMMISSIONERS TO EMPANEL, AND THE SAID SHERIFF TO SUMMON, A TRAVERSE JURY IN THE COURTS OF QUARTER SESSIONS OF THE PEACE AND OYER AND TERMINER AND GENERAL JAIL DELIVERY, CONSISTING OF 120 QUALIFIED ACCORDING TO LAW, TO MAKE UP THE JURY REQUISITE TO INQUIRE OF AND PERFORM ALL THOSE THINGS WHICH ON OUR PART SHALL BE ENJOINED UPON THEM, AT THE TERM THEREOF TO BE HELD AT DOYLESTOWN, IN AND FOR THE COUNTY OF BUCKS, COMMENCING ON THE 17 DAY OF MAY A. D. 1948, NEXT AFTER THE DATE OF THIS PRECEPT, TO SERVE FOR THE TERM THEREOF COMMENCING ON THE 1 DAY OF JUNE A. D. 1948, DATED AT DOYLESTOWN, THIS 12 DAY OF APRIL A.D. 1948.

HIRAM H. KELLER L.S.

PRESIDENT JUDGE

CALVIN S. BOYER L.S.

JUDGE.

EO DIE—1948 JUNE 1—COURT CALLED AT 10 O'CLOCK A.M. HON. HIRAM H. KELLER—P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

EO DIE—LIST OF TRAVERSE JURORS SUMMONED AND RETURNED BY THE SHERIFF TO THE MAY TERM OF CRIMINAL COURT A.D. 1948. (SECOND WEEK)

1. FRANCES C. ASHWORTH (NON EST) 2. EDMUND C. ANDERSON 3. ALVIN ALBRECHT 4. CLARENCE G. ANGENY 5. JOHN ALCORN (MORT EST) 6. J. HARPER ATKINSON 7. DUDLEY E. BELL 8. ANNA

Relator's Exhibit No. 10 (c)

W. BUCHER 9. RUTH G. BLISS 10. IRENE E. BLANCHARD 11. FLORENCE BECK 12. JOHN BARBER 13. MAUDE C. BUCKMAN 14. VIRGINIA BRILLMAN 15. WALTER S. BERGER 16. MARGUERITE BERGSTRESSER 17. CHARLES A. BARNDT 18. CHARLES G. BRODIE 19. GEORGE BERNER 20. CATHRINE BENNETT 21. ELWOOD W. BUCK, SR. (NON EST) 22. ELIZABETH STETSON BARRY 23. FANNY W. BENER 24. ANNA E. COLE 25. JAMES COURT 26. HUGH P. CASSEL 27. JOHN J. COLE (NON EST) 28. GLADYS A. CARNWATH 29. ROBERT H. CLARENDON 30. DOROTHY M. DARRAH 31. GERTRUDE DIXON 32. ERNA M. DOANE 33. ELIZABETH G. ELVILLE 34. MARTIN FREI 35. U. CALVIN FLUCK 36. IRENE FRACK 37. JOSEPH A. FERRY 38. JOHN G. FERGUSON 39. ALICE S. FREED 40. MIRIAM W. FLORY 41. FRANKLIN T. FRETZ 42. RACHEL L. FOX 43. ALLEINE C. GARDINER 44. EDWARD GREEN 45. H. ARTHUR HELLYER 46. JESSE H. HORNE 47. JOSEPH S. HETHERINGTON 48. EMILY O. HIGGENBOTTOM 49. WILLIAM F. HICKEY 50. JOSEPH F. HIBBS 51. JOHN E. HARROP 52. ERNEST F. HAMM 53. ROBERT W. HALL 54. JOHN M. HARDING 55. JOHN R. HANSBURY 56. MARIAN HARM 57. SAMUEL J. ILLICK 58. JAMES G. JACKSON 59. EVA F. KINSEY 60. RUSSELL F. KLEINMAN 61. GEORGE H. KERNS 62. CLIFTON LEEDOM 63. DELBERT LYNN 64. JOSEPH E. LOWNES 65. HAROLD LAKE 66. OLIVER C. LANDIS 67. MILDRED LEWIS 68. HAROLD L. LOUD

RELATOR'S EXHIBIT No. 10(d).

OYER AND TERMINER CRIMINAL DOCKET,
BUCKS COUNTY, 1943.

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MAY TERM A. D. 1948

69. EVERITT MILLER (NON EST) 70. ROGER MASON
71. HELEN VIRGINIA MANN 72. CHARLES L. MILLER
73. LEONARD MILLER 74. NICHOLAS MISLAN 75.
EMILY V. MADDUX 76. R. BARCLAY MOON 77.
ETHEL G. MOYER 78. ELSIE MARKLEY 79. STANLEY
R. MCKNIGHT 80. MARY MAE MELCHIOR 81. ILSE
MULLIGAN 82. WILLIAM MULLOY 83. ELMER OTT
84. FRANCIS M. PHILLIPS 85. HOWARD PRICE 86.
ELIZABETH H. PREVOST 87. CARLTON A. PALMER
88. NORMAN S. PENROSE 89. GEORGE B. PAXSON 90.
W. D. PARDOE 91. ANN L. REED 92. NOAH M. RICE
93. J. ALFRED RIGBY, JR. 94. FRANK REPETSKI 95.
MABEL J. ROOK 96. VELMA A. ROSENBERGER 97.
EDWARD J. RYAN (NON EST) 98. WILLIAM S. V.
RODGERS 99. WILLIAM H. SLAUGHTER 100. LO-
VADA B. SCHLICHTER 101. WILLIAM FRANK SIG-
LEY 102. ELVA A. SHIVE 103. IRA M. SWARTZ 104.

2

JACOB SHIVO, JR. 105. ANNA K. SHAUDYS 106.
JOHN MCLAREN STRONG (NON EST) 107. MARY E.
SINGLEY 108. EMMA SHADDINGER 109. MABEL
SENDERLING 110. MARY TYSON 111. WESLEY H.
TALLEY 112. MARIE R. TORONGO 113. ALDA L. TET-
TEMER (MORT EST) 114. HARVEY M. WISMER 115.
AMY P. WURST 116. MARVIN D. WEIDNER 117.
PETER WICHSER 118. HARRY T. WESTLAKE. 119.
DORIS C. WILSON 120. HARRY W. WAMBOLD
EO DIE—THE SECOND WEEK TRAVERSE JURORS
HAVING BEEN CALLED, ALL ANSWERED TO THEIR
NAMES BUT THE FOLLOWING:

FRANCES C. ASHWORTH; JOHN ALCORN;
IRENE E. BLANCHARD; FLORENCE BECK; VIR-
GINIA BRILLMAN; CHARLES G. BRODIE; GEORGE
BERNER; CATHRINE BENNETT; ELWOOD W.
BUCK, SR.; ELIZABETH STETSON BARRY; FANNY
W. BENNER; JAMES COURT; JOHN J. COLE;
GLADYS A. CARNWATH; DOROTHY M. DARRAH;
GERTRUDE DIXON; IRENE FRACK; JOSEPH A.
FERRY; ALICE S. FREED; EDWARD GREEN; H.
ARTHUR HELLYER; JOSEPH S. HETHERINGTON;
JOHN M. HARDING; MARIAN HARM; MILDRED
LEWIS; EVERITT MILLER; ELSIE MARKLEY;
MARY MAE MELCHIOR; WILLIAM MULLOY;
ELIZABETH H. PREVOST; MABEL J. ROOK; ED-
WARD J. RYAN; ANNA K. SHAUDYS; JOHN
MCLAREN STRONG; MARY TYSON; MARIE R.
TORONGO; ALDA L. TETTEMER; HARVEY M.
WISMER; AMY P. WURST; PETER WICHSER.

RELATOR'S EXHIBIT NO. 12.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 23, 1947.

(Page 1).

BANDITS Shot Three Men in Holdup at Two Taprooms

Police Pick Up Suspects Who Have Been Identified

**Four Young Men Wore No Masks—Police Say the YOUNG
PHILADELPHIANS, Who Held Up Feasterville and
Penndel Inns, Admit Robberies in New
Jersey and Abington**

(By a Staff Reporter)

Feasterville, Dec. 23—Four suspects were picked up in Philadelphia early today after a quartet of armed bandits shot and seriously wounded three men and fled with \$425 in two Bucks county taproom holdups.

They gave their names at the Fourth Division detective headquarters as: Harold Foster, 23, of the 4000 block of Teasdale st.; David Darcy, 22, of the 5300 block of Large street; Harry Zeitz, 18, of the 5400 block of Oakland street, and Felix Capone, 16, of the 1700 block of Brill st.

They were all questioned early today in Philadelphia on a number of other robberies in the Philadelphia area. The accused have been identified by witnesses, according to the police, although formal charges had not been lodged up until 9:30 this morning. Police say the boys admitted several New Jersey robberies and one in Abington.

Two patrolmen arrested the men in an automobile at Frankford ave., and Friendship st., and said they answered the description of the bandits.

Terrorizing a wide suburban area, the bandits—all quite young, and two of them from well known Philadelphia families—staged robberies at Feasterville and Penn del, then eluded traps set by State Police and posse in both area.

SHOT THREE MEN

The gunmen shot Edward

(Please turn to Page 6)

(Italics Supplied)

RELATOR'S EXHIBIT NO. 13.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 23, 1947.

(Page 6).

BANDITS Shot Three Men

(Continued from First Page)

both of Feasterville, patrons at the Feasterville cafe on the Bustleton pike. They took a total of \$195 from 15 patrons and the cash register. Upon leaving, the bandits fired again, wounding William Kelly, of Trevoise, in the head.

Kelly was taken to the Abington Memorial Hospital, while State Police of the Langhorne detail took Wunsch and Hellerman wounds in the right arm and shoulder.

While a widespread police hunt got under way, the bandits entered Deacon Inn, near Penndel taking \$140 from 12 male customers and \$100 from the proprietor, Fred Lachenman.

Eight State troopers from Langhorne and County Detective Anthony Russo, of Bristol, were working on the case throughout the night.

Midnight Raid

According to Corporal R. D. Evans, the thugs first entered the Feasterville cafe a few minutes before midnight. Fif-

teen men and women patrons were inside the place. They had been watching a television broadcast of prize fights. The intruders asked to be served and while James Brown, operator of the place, was complying, the *thugs* pulled revolvers from their pockets and ordered the patrons to line up against the bar.

Women Ran Screaming

Quickly, the *holdup men* removed more than \$150 from the pockets of the customers, then took \$45 from a cash register. A woman patron ran outside as the holdup was in progress screaming for help.

Her actions apparently upset the *bandits*. When two patrons, Wunsch and Hellerman, hesitated in handing over their wallets, all of the *thugs* opened fire on them. Both fell to the floor wounded.

Then the *bandits* ran outside and started for their waiting automobile. Again, the woman patron screamed, this time in an attempt to attract neighbors. Kelly, who was passing, went to her assistance. Without any warning, one of the robbers shot him.

Rob Deacon Inn

Upon entering the Deacon Inn on the Lincoln Highway near Penndel, all the *bandits* pulled their weapons from their pockets as they entered the place. One man stood guard at the front door to the establishment as the others ordered 12 male patrons to remain quiet. Then they took about \$140 from the pockets of the customers.

When Lachenman, 58, the proprietor of the inn, made a

motion toward a telephone, one of the *thugs* fired a warning shot above the bar. Before fleeing the men took approximately \$100 from a cash drawer.

Eye Witness Story

An eye witness account of the holdup at the Easterville Cafe was related to a "Daily Intelligencer" reporter this morning by John Naysmith, a nephew of James Brown, former owner of the place, who resides in the building with Naysmith and his wife.

"I was back of the bar at about 11:30 last night and there were about 18 customers in the place", Naysmith related. Some of the customers were playing shuffleboard in a rear room. Three young men about 22, all white, and unmasked, came into the place brandishing guns. One of them leaped over the bar, yelling 'This is a stick-up'. One went to the back room and in there the group started to wrestle the *bandit*. The *bandit* got loose and ordered the men out of the back room into the main tap room.

"A woman from Fox Chase ran out of my place about this time and across the street to the Buck Hotel to get help. One of the *bandits* fired his gun.

"Wunsch's father-in-law was in the main tap room. He was able to get his son-in-law out of the door while the *bandits* were still inside. Hellerman, who had also been shot, with Wunsch, was lying on the bar room floor.

"The *bandits* emptied my cash register of between \$68 and \$70. They then made all the customers put their wallets on the bar and the thugs hurriedly emptied them. Then the *bandits* took wrist watches from five or six customers. My wife was in the kitchen of the place and she, too, was ordered into the main bar room during the holdup.

"The *bandits* shot out the telephone and walked out the front door, as one *bandit* ordered, 'Keep quiet for quite a while.' Then they shut the door, but in a few seconds, one of the *bandits* again opened the door, looked inside and waving his gun, called out, 'Be sure, don't move, and a Merry Christmas to you all'".

The *bandits* disappeared in a 1939 Plymouth sedan, the same machine in which they were picked up early today in Philadelphia.

(Italics supplied)

RELATOR'S EXHIBIT NO. 14

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 24, 1947.

(Page 1).

BANDITS Admit Shooting Five Persons in Holdups

Bucks county authorities including State Police of the Langhorne sub-station are assisting in the check-up of the series of tavern robberies in the Bucks and Philadelphia counties area by a quartet of "trigger-happy" youths.

The four boys—all Philadelphians—admit the Feaster-ville cafe holdup and another near Penndel, together with several others in Delaware, Montgomery and Bucks counties and at three points in South Jersey.

The boys admitted shooting five persons all told, including three in the Bucks county holdups on Monday night.

At the Abington Memorial Hospital, the chief resident physician told a "Daily Intelligencer" reporter that the condition of William Kelly, of Trevoise, one of the victims of the shooting was still critical. He was shot through the head, but the bullet missed his brain.

In their first questioning yester day Lt. John Hanlon asserted that the gunmen had confessed staging the Bell

Corner Tavern holdup in Rhawnhurst on Dec. 6, in which two men, one a city fireman, were wounded and a third injured.

One Suspect is 16

Three of the men, identified as Harold Foster, 23, of Teesdale st., near Frankford ave.; David Darcy, 22, of Large st., near Bridge, and Harry Zeitz, 18, of Oakland st., near Sanger; were held for a hearing today at Paul and Ruan sts. The fourth, Felix Capone, 16, of Brill st., near Duffield, was removed to the House of Detention for action of juvenile authorities.

The three latest victims of blasting tavern gunfire, shot down in the Feasterville Tavern, Bustleton pike and Bridgetown rd. late Monday night, remained in hospitals yesterday.

Allen Hellerman, 45, of 3453 Palmetto st., was in Nazareth Hospital with bullet wounds of the neck. Edward Wunsch, 25, of Buck rd., Feasterville, was admitted to the same hospital with bullet wounds of the left shoulder and right arm.

In addition to shooting these victims, police said the youthful quar-

(Please turn to Page 5)

RELATOR'S EXHIBIT NO. 15.

DOYLESTOWN DAILY INTELLIGENCER
DECEMBER 24, 1947.

(Page 5).

BANDITS Admit Shooting

(Continued from First Page)

tet had admitted carrying out the holdup of the Bell Corner Tavern, operated by Mrs. Theresa Deppenschmidt, at 8400 Bustleton pike, Rhawnhurst, on Dec. 6.

Fireman Wounded

In that burst of gunfire, Arthur Coffin, 54, of 9514 Cowden st., Phila., a city fireman, was shot through the chest and abdomen as he attempted to seize the weapon of one of the thugs. George Clinger, 39, of 3742 Poppy drive, was shot through the right leg and Walter Watton, 55, of 2055 W. York st., suffered a gashed right hand in trying to grab one of the bandits' guns.

Police said the quartet also had admitted carrying out tavern holdups at Hammonton, Palmyra and Camden, in

South Jersey; in Abington township, Montgomery county, and at Ridley Park, in Delaware county, in addition to the two Bucks escapades.

The Feasterville holdup was staged quickly and 18 patrons were terrified by repeated threats of the bandits' willingness to "shoot it out".

Leader is Boastful

Mrs. John Naysmith, wife of the tavern's owner, said all four drew weapons and that the gang's leader warned:

"Just behave yourselves. That way you won't get hurt. We're the guys who pulled the Bell Corner stickup and we don't take any nonsense."

As the bandits began to gather their loot, one said:

"I hope a couple of State coppers come in. We'll shoot them, too".

Patrons Robbed

The gang collected \$70 from the tavern's till, then took a \$59 and a \$75 watch from George Roth, 38, of Feasterville; \$45 and a \$25 watch from Frank Fronstale, 45, of Bustleton pike, and about \$200 in cash and jewelry from other patrons.

"He's Dead", One Says

Miss Winnie Wiley, 32, of 8300 Verree rd., a friend of Hellerman's ran to his side.

"Oh, Reds", she cried, "What have they done to you?"

"Don't bother, lady," one of the *gunmen* said. "He's dead".

At that point the four men turned and ran out, firing several additional shots as they fled.

Kelly, the man most seriously wounded, was standing outside, talking to a friend, Frank Walters, 28, of Feasterville, when one of the last shots struck him in the head.

(Italics supplied)

RELATOR'S EXHIBIT NO. 16.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 26, 1947.

(Page 1).

Murder Now Faces the Four BANDITS

William Kelly, 38, Trevoise Died From Shot In Head

**Dead Man Was Shot On Outside of Feasterville Inn
When Bandits Fled After Shooting Two Other Men
CALLOUSLY During the Holdup—Later Went
To Penndel and Held Up Inn**

Bucks County now has a *four-way murder case* on its hands as a result of the death of William Kelly, 38, Trevoise, who was shot during the holdup of the Feasterville Tavern last Monday night. Kelly died in the Abington Hospital on Wednesday night.

The four young *Philadelphians* who were arrested by

Philadelphia police several hours after the holdup and shooting, will be brought to Bucks county some time today for a hearing and final arraignment before a Justice of the Peace.

Charges of murder will most likely be lodged against all four defendants, although the fatal shot was fired by only one of the quartet. In case of murder in Pennsylvania, all must be equally charged in a case of this type.

District Attorney Edward G. Biester and his assistant, Willard Curtin, will have charge of the prosecution of the four youthful bandits, and the details leading up to their trial—after they are brought into the Bucks county jurisdiction.

Three of the four men who, according to Philadelphia police, have admitted the holdup in which Kelly was fatally shot and two others were shot, will be brought from a cell in a Philadelphia station house, to Bucks county today. The fourth bandit will be brought from the House of Detention to Bucks county. State Police of the Langhorne sub-station will see to it that the accused arrive here safely.

Feeling Runs High

The general feeling of the public—in Bucks county at least—appears to be that no time should be spared in bringing the youthful

(Please turn to Page 5)

RELATOR'S EXHIBIT NO. 17.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 26, 1947.

(Page 5).

Murder Faces Four BANDITS

(Continued from First Page)

bandits to trial, and that it is a "break" for society at large to have the trials in Bucks county rather than in Philadelphia.

Those who will be given hearings, before a Bucks county Justice are Harold Foster, 23, of Teesdale st., near Frankford ave.; David Darcy, 22, of Large st., near Bridge; Harry Zeitz, 18, of Oakland st., near Sanger, and Felix Capone, 16, of Brill st., near Duffield—all of Phila.

Kelly, who died in the hospital, was standing outside the Feasterville Tavern at Bustleton pike and Bridgetown rd., when the *four bandits* emerged from the place, still shooting after hitting two customers. One of the bullets hit Kelly in the head.

The other victims wounded were Allen Hellerman, 45, of 3453 Palmetto st., Phila., and Edward Wunsch, 25, of Buck rd., Feasterville, both of whom were taken to the Nazareth Hospital with bullet wounds. The condition of Hellerman and Wunsch is not considered serious.

After holding up the Feasterville Tavern, the same *four bandits* held up Deacon's Inn, on the Lincoln Highway, a half mile south of Langhorne. They got nearly \$400 in cash at the Feasterville Tavern, and about \$240 at Deacon's Inn.

(Italics supplied)

RELATOR'S EXHIBIT NO. 18.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 27, 1947.

(Page 1).

District Attorney Is Investigating Murder

Checking Up on Scene About the Holdups

One BANDIT Only 16

District Attorney Edward G. Biester left early today for Feasterville to check up on some additional information in preparation for the prosecution of "Philadelphia's four young 'trigger-happy' bandits arrested in Philadelphia after killing a Trevoise man in a taproom holdup last Monday night.

Yesterday the bandits were held without bail in Philadelphia by Magistrate William Hagan pending arrangements for their transfer to the Bucks County authorities

which was delayed yesterday somewhat because of weather conditions.

District Attorney Biester, however, conferred this morning with Assistant District Attorney Willard Curtin, of Morrisville, at Feasterville, where one of the holdups took place and where William Kelly was fatally shot outside the Feasterville Tavern.

The *Philadelphians* who will be transferred to Bucks county for trial on a charge of murder—after formal arraignment—should reach the Bucks County Prison before next Monday.

They were seized in Phila. after a wild chase by police of the northeast Philadelphia section and State Police of the Langhorne sub-station. They were recognized from a radio description sent out shortly after they *shot their way* out of the Feasterville Tavern, leaving three wounded men at the scene.

William Kelly died in Abington Hospital Wednesday night. Two other victims, Allen Hellerman, Phila., and Edward Wunsch, Feasterville; were still in the Nazareth Hospital this morning.

Held without bail yesterday for a further hearing early next week are Harold Foster, 23, David Darcy, 22, and Harry Zeitz, 18, all of Phila. The fourth, Felix Capone, 16, has been turned over to the juvenile court authorities, and District

(Please turn to Page 3)

RELATOR'S EXHIBIT NO. 19.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 27, 1947.

(Page 5).

Dist. Attorney Investigating

(Continued from First Page)

Attorney Biester will confer with them today in Philadelphia, concerning the 16-year-old suspect.

At yesterday's hearing, Lt. John Hanlon of the 4th Detective Division, Phila., testified that the four readily admitted committing other holdups in the New Jersey communities of Palmyra, Camden and Hammonton and in Bucks, Delaware and Montgomery counties.

(Italics supplied)

RELATOR'S EXHIBIT NO. 20.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 27, 1947.

(Page 2).

(Editorial).

Fast Police Work

THE ROUNDING UP of the *young gunmen* who robbed the Feasterville and Penndel safes, and *admitted many other robberies*, is something for which we can thank the police of the county and Philadelphia.

What the public and the police will be watching closely in what is done to these potential killers when they come before the bar of justice.

One of the victims of the *callous* shootings has since died. Something else that is particularly worth while remembering is the statement of one of the witnesses that one of the *young gunmen* remarked that it was lucky that no State

Relator's Exhibit No. 20

Police were on the scene, because they also would have been shot.

When we stop to consider the number of policemen who have been killed by *trigger-happy bandits*, it is not difficult to believe that the *gangster* meant what he said.

We have always wondered why the police so often take chances with wanted men who are known to be gun-toters and potential killers.

It is especially surprising in view of the miscarriage of justice in Philadelphia recently . . . when a jury predominantly made up of women, gave the killer of two cops life imprisonment instead of the electric chair, especially in view of the previous record of the killer.

(Italics supplied)

RELATOR'S EXHIBIT NO. 21.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 29, 1947.

(Page 1).

Murder Victim Funeral Held Last Saturday

**William Kelly, the Dead Man, POPULAR CITIZEN
of the Trevoise Area**

(Special to The Intelligencer)

Trevoise, Dec. 29—Residents of this community paid their last respects on Saturday afternoon to a life-long resident of that community who became the innocent victim of four "trigger-happy" bandits in a holdup and shooting at Feasterville a week ago tonight.

The occasion was the funeral of William Kelly, 38, of Trevoise, who died in the Abington Memorial Hospital last Wednesday night. He was standing outside the Feasterville Tavern a week ago tonight when he was struck in the head

by a bullet as the *four thugs*, shooting as they ran from a holdup, fled to their car.

Kelly, a native of the Feasterville section, was a *popular member of Trevoise community* where he resided most of his life. He had been employed in Philadelphia. The funeral was held at the Churchville Cemetery.

Kelly is survived by his mother, four brothers and four sisters.

As plans were being completed for the funeral service on Saturday, the Bucks county and Philadelphia county authorities were in the Feasterville section with the *four youthful bandits* for the purpose of re-enacting the scene of the crime.

Up until this morning the four accused were still in the custody of the Philadelphia authorities, but they will be turned over to the Bucks county authorities this week.

They are Harold Foster, 23; David Darcy, 22; Harry Zeitz, 18; and Felix Capone, 16, all of Phila.

(Italics supplied)

RELATOR'S EXHIBIT NO. 22.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 31, 1947.

(Page 2).

(Editorial).

ERRORS OF JURORS

LONG BEFORE the Philadelphia murder jury, largely made up of women, outraged the public by sentencing a bad actor who had murdered two policemen in a gun battle, there was criticism of the inefficiency of jurors.

Courts very frankly excoriated juries for acquitting persons when the evidence was regarded as ample by the Judges.

One of the suggestions made was that we should have professional jurors who would be versed in court procedure, the weight and importance of evidence, and courageous and conscientious in the performance of their duties.

In the discussion, which suggested that the Judges should

Relator's Exhibit No. 22

impose the sentences, there was a demurrer . . . that the Judges in murder cases, when facing the responsibility of fixing the sentences, had not always risen to the responsibility . . . but evaded it in many instances.

However, it should not be overlooked that it is not only in murder cases that juries frequently render verdicts that it is difficult to explain. We have the same situation with reference to drunken drivers . . . and in coroner's juries when it comes to placing responsibility for fatalities on the highways.

The responsibility for miscarriage of justice does not rest alone with jurors . . . strange as their conclusions appear to be at times . . . but in the courts and in the public's mind as it is expressed in antagonism to punishment for certain types of offenders.

(Italics supplied)

RELATOR'S EXHIBIT NO. 23

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 5, 1948.

(Page 1)

Four Held for Murder

(By a Staff Reporter)

Langhorne, Jan. 5—Held on a charge of murder, four youthful Philadelphians were this morning formally arraigned before Justice of the Peace Horace A. Cooper at his office here and committed to the Bucks County Prison, without bail, for the action of the grand jury at the February term of criminal court on February 9.

Charged with the fatal shooting of William Kelly, 38, of Trevese, in front of the Feasterville Tavern following a hold-up and robbery, the four charged with murder are Harry Zeitz, 18, who police say has confessed to firing the shot that killed Kelly, (although not intentionally); Harold Foster, 23; David Darcy, 22, and Felix Capone, 16.

The Commonwealth was repre-

(Please turn to Page 4)

RELATOR'S EXHIBIT NO. 24.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 5, 1948.

(Page 4).

Four Held for Murder

(Continued from First Page)

sented this morning by Assistant District Attorney, William Curtin of Morrisville, who called but two witnesses.

The accused were brought to the hearing and returned to the Bucks County Prison by State Police Dane and Cargano, of the Langhorne detail.

Dr. John C. Simpson, of 920 Swede St., Norristown, coroner's physician of Montgomery county, who performed an autopsy on William Kelly in the Abington Memorial Hospital on December 25, several days after the shooting, testified that the examination revealed that Kelly had died as the result of a gunshot wound in the head that caused cerebral hemorrhage.

Chief County Detective Anthony Russo, of Bristol, the prosecutor, testified that on December 22, the four accused boys signed statements concerning the crime. Harry Zeitz, Russo said, admitted firing the shot in the air "upwards and backwards," that hit Kelly.

The accused, except Darcy, are represented by counsel, so far. I. Louis Rubin, Bristol attorney, was at the hearing this morning representing Zeitz. He was the only attorney there this morning with the exception of Mr. Curtin for the Commonwealth.

Mr. Curtin gave no indication at the hearing or immediately following it, whether the commonwealth would press for the death penalty at the time of the trial.

(Italics supplied)

Relator's Exhibit No. 25

RELATOR'S EXHIBIT NO. 25.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 16, 1948.

(Page 2).

The Gossiper

* * *

Only today they get away with it oftener . . . because of the soft treatment they know they are going to get if they are caught . . . and, later, because they gamble with the idea that, if they get a smart and unscrupulous "mouth-piece" they can "beat the rap".

* * *

If the mentally subnormal persons were given institutional care . . . and courts and jurors were to dispense with a lot of the sentimentality about criminals . . . the general public would not face so many horrible crimes as horrify newspaper readers daily.

(Italics supplied)

RELATOR'S EXHIBIT NO. 28.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 27, 1948.

(Page 1.)

Coroner's Jury Acts in Kelly Slaying

Find He Dies of Gunshot Wound In The Head

Murder Trial Here

(Special to The Intelligencer)

Norristown, Jan. 27—At a brief inquest conducted by Coroner Winslow Rushong in the Montgomery County Court House, here, this morning, and attended by county authorities, the fact was established to the satisfaction of the coroner's jury that William Kelly, 38, of Trevoise, met his death on December 24, last year, as a result of a gunshot wound.

Only two witnesses were called by District Attorney Edward G. Biester, of Bucks county, to establish another link that will lead to the prosecution of four Philadel-

(Please turn to Page 3)

RELATOR'S EXHIBIT NO. 29.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 27, 1948.

(Page 3).

Coroner's Jury Acts

(Continued from First Page)

phia boys who will be charged with the murder of Kelly.

Kelly was shot twice during a hold-up at the Feasterville Tavern on the night of Dec. 22, and died in the Abington Memorial Hospital on Dec. 24.

Arrested after the holdup were the following youths, now in the Bucks County Prison at Doylestown, awaiting the action of the grand jury at the February term of court: Harold Foster, 23; David Darcy, 22; Harry Zeitz, 18; and Felix Capone, 16.

The first witness called before Coroner Rushong this morning was Pvt. Kenneth R. Dane, of the Langhorne substation of State Police, who testified as to several of the highlights surrounding the holdup and shooting. Trooper Dane testified that Zeitz had signed a statement admitting that he fired two shots in the direction of Kelly as he was leaving the hotel with the others.

The only other witness was Dr. John C. Simpson, Montgomery county coroner's physician, who testified that the cause of death was a gunshot wound in the head.

(Italics supplied)

RELATOR'S EXHIBIT NO. 31.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 2, 1948.

(Page 2).

(Editorial).

WHO'LL BE THE NEXT?

NOT AN ISSUE of the newspapers of this metropolitan area is without a *gruesome story* describing the brutal beating of aged men and women, on the streets or in their shops by holdup men.

Very often the victims of the brutes who beat them up have died.

So far as the authorities and the public are concerned, not a great deal of attention is being paid to the cases to see that the thugs are given impressive punishment which would intimidate other brutes from following the example set.

For the most part the thugs select as their victims elderly or old folks, or women. They have been taught not to tackle

the able-bodied, unless they are reinforced by a gun or can sneak up on the victims from behind, or attack him in pairs.

The able men who have been tackled have, in many instances, turned the tables on the thugs. So they select their victims carefully.

If juries and the courts will make examples of these cowardly enemies of society, there will be fewer of their assaults.

They are not merely roughnecks, but potential murderers.

It would be lamentable if citizens were forced to take the punishment of them into their own hands.

(Italics supplied)

RELATOR'S EXHIBIT NO. 34

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 6, 1948.

(Page 1).

Less Power for Juries

Harrisburg, Feb. 6 (INS)—A Legislative committee today opposed a Philadelphia judge's *proposal to relieve juries of the power to fix penalties in cases involving first degree murder.*

The joint State Government Commission's committee on penal laws and procedure, headed by Sen. John W. Lord, Jr., (R) Phila., chose to "preserve" the power of juries to impose the death sentence or life imprisonment on persons convicted of first degree murder.

Judge Harry S. McDevitt had recommended that the committee submit to the 1949 Legislature a *proposal to deprive jurors of the power, claiming they "do not know how to exercise it".*

McDevitt's recommendation resulted from the trial of

William K. Hallowell, 23-year-old slayer of two Philadelphia policemen, who was given life imprisonment by juries in each of two separate trials.

"It was preliminarily determined that the committee at this time was opposed to any change in the law taking the present power away from the jury to determine whether life imprisonment or death should be imposed in first degree murder cases", Lord explained.

However, Lord said the committee believed a change proposed to the 1947 General Assembly "would do much for enabling juries to assess proper verdicts in murder cases".

The proposal would permit juries to make two findings: First a verdict of guilt or innocence and secondly, a sentence of either life imprisonment or death. Lord explained that at present juries give sentence with the verdict of guilty.

(Italics supplied)

RELATOR'S EXHIBIT NO. 34

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 6, 1948.

(Page 1).

Murder and Manslaughter Cases on Criminal List

**Nine Accused of Drunken Driving—MURDER CASE MAY
BE CONTINUED—Two of The Manslaughter Cases
Are Holdovers—43 Cases On the List**

One murder case with four accused and six involuntary manslaughter cases are scheduled for the February term of criminal court among the total of 43 cases, to make it one of the most important criminal sessions in a long time. The trial list shows 37 new cases and six continued cases.

The murder case charges Harold Foster, 23; David Darcy, 22; Harry Zeitz, 18; and Felix Capone, 16, with the death

• Relator's Exhibit No. 34

of William Kelly, 38, of Trevoze, who was shot outside the Feasterville Tavern on the night of December 24, last year, following a hold-up. Kelly died in the Abington Memorial Hospital, a short time after the shooting, and murder charges were lodged against the defendants who were arrested in Philadelphia and transferred to Bucks county.

District Attorney Biester said this morning that the murder case is scheduled for the action of the grand jury when it convenes next Monday morning, Feb. 9, but that the case will in all probability be continued until the May term.

* * *

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Relator's Exhibit No. 35

RELATOR'S EXHIBIT NO. 35.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 6, 1948.

(Page 7).

Murder and Manslaughter

(Continued from First Page)

New Cases

Murder: Harold Foster, David Darcy, Harry Zeitz and
Felix Capone.

* * *

(Italics supplied) .

RELATOR'S EXHIBIT NO. 36.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 10, 1948.

(Page 1).

Four Youths Indicted for Feasterville Murder

Safely in the custody of four State troopers from the Doylestown sub-station of State Police, four youthful Philadelphians charged with murder of an innocent by-stander following a tap room hold-up at Feasterville last December, were brought from the Bucks County Prison to the Court House shortly before 10 o'clock this morning.

Shortly after court convened, District Attorney Edward G. Biester asked permission of the court to send the cases of the four youths before the Grand Jury for action.

Charged with being responsible for the death of William Kelly, 38, of Trevoise, the trigger-happy bandits, arrested in Philadelphia after the hold-up of the Feasterville Tavern, are as follows:

Harry Zeitz, 18, who police say was the trigger-man who fired the fatal shot; Harold Foster, 23; David Darcy, 22, and Felix Capone, 16.

The neatly-dressed youths impressed court officers and spectators as high school juniors rather than murder-accused defendants, as they sat and listened attentively to the special charge to the Grand Jury delivered this morning by President Judge Keller.

The special charge dealt with murder. Eight women and ten men are serving on the Grand Jury. The charge was delivered in court room No. 1.

The four guarding troopers surrounded the four accused defendants at vantage points—and the sheriff, two deputy sheriffs and county detectives were also on hand.

Zeitz, the alleged "trigger-man" sat next to Sheriff Ahlum. Judge Keller took but 10 minutes to deliver the special charge. His closing remarks emphasized the point that if the jury finds that any of the accused, assisted in the

(Please Turn To Page 5)

RELATOR'S EXHIBIT NO. 37.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 10, 1948.

(Page 5).

Four Youths Indicted

(Continued from First Page)

crime in any way, they are equally guilty in the offense charged.

Six witnesses were then called before the Grand Jury in a separate room. They included the prosecutor, Chief County Detective Anthony Russo, of Bristol.

Zeitz is represented by Attorney I. Louis Rabin, of Bristol. Two other attorneys, Webster S. Achey and Frederick Smith are interested in the defense.

The grand jury returned true bills against all four defendants at 10:55 o'clock, this morning, and they now stand indicted on the charge of murder.

District Attorney Edward G. Biester then moved for a continuance of the cases until the May term of court on the grounds that one of the witnesses for the Commonwealth is confined to a hospital at present, and cannot appear in court, and that Foster, one of the defendants, still is without an attorney.

(Italics supplied)

RELATOR'S EXHIBIT NO. 38.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 11, 1948.

(Page 2).

(Editorial).

ENRAGED CITIZENS

MOB LAW IS NOT the kind we want in this country . . . but there probably were thousands of women, especially, who felt like cheering when they read that a 35-years-old truck driver, who was convicted of an attempted attack on a married woman of Calstadt, N. J. . . . and was merely fined \$25 . . . was tarred and feathered.

Presumably they felt that \$25, which is about what some brute would be fined for cruelty to a dog, was not adequate punishment for the attack on the woman, that it was inadequate to intimidate others like the defendant from attempting similar attacks . . . and remembered that courts

have even let rapists escape with ridiculously light punishment.

It is fair to believe that if the officials imposing such alarmingly light sentences would not have been so gentle in their attitude if the victims of attackers and rapists had selected girls or women of their own families as the victim of their beastliness.

The reason for such leniency is difficult to find . . . when the officials must realize that, even though there may be no more serious results than shock, the chances are that the victims will be psychologically affected for many years.

In a Delaware court at this time three men are on trial for attacking a young woman . . . and, if they are convicted, will face the death sentence.

(Italics supplied)

RELATOR'S EXHIBIT NO. 40.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 16, 1948.

(Page 1).

10 YOUNG PROBLEMS

Something to worry about in the way of juvenile delinquency, has been furnished by ten Philadelphia boys now incarcerated in the Bucks County Prison.

Four of the boys are charged with murder.

Six of the boys are being charged today with robbery, fire-arms violations, stick-ups and burglary.

Ages of the boys make police and others wonder what's going to happen next. Two boys are juveniles at the age of 16. Another juvenile is 17. Two of the boys are 18; one is 20; one is 21; two are 22; and one is 23.

One of the 16-year-old boys carried a loaded revolver in his stocking, and one 18-year-old boy was the one accused of pulling the trigger in the murder case.

(Italics supplied)

RELATOR'S EXHIBIT NO. 40.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 16, 1948.

(Page 1).

**Police Connect Six BANDITS Arrested Here With a
Number of Robberies and Holdups**

**THEY ALSO KNOW MEMBERS
OF THE BOY-MURDER GANG**

(By a Staff Reporter)

With the arrest of another Philadelphia robber gang of six young bandits by two alert Doylestown police officers, authorities have been able so far to pin at least six Philadelphia robberies and stickups on the accused, in addition to a \$3,000 Bucks county robbery, a stolen truck job, firearms act violations—and an attempt to hold up Bucks county's most pretentious estate.

The investigation progressed rapidly after Assistant Chief of Police Clarence Irwin and Patrolman George Harton ar-

rested the six bandits early last Saturday morning in Doylestown, when they stripped them of firearms and 114 rounds of ammunition in the Doylestown police station.

The arrest was made while Irwin and Harton were on "routine patrol," and after they had discovered two of the bandits trying to make a get-away with a truck in the rear of Clymer's Department Store. The other four bandits were located in a "borrowed" car that was parked a half-block from the Clymer store.

The ages of the bandits range from 16 to 22. On the youngest bandit, when he was searched by Patrolman Harton, was found a revolver stuck inside his left stocking near the shoe-top.

All six bandits will be given hearings today before Justice of the Peace Russell B. Gulick. A seventh bandit was arrested on Sunday in Philadelphia in connection with the escapades of the other six and is held on a stolen property charge.

The Bucks County Prison was a beehive of police and Philadelphia detectives on Saturday afternoon. The bandits were questioned at length by Trooper John Mitchell, of the Doylestown sub-station of State Police, who will be the prosecutor in the case here in Bucks County.

Other police who questioned the

(Please turn to Page 4)

RELATOR'S EXHIBIT NO. 41.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 16, 1948.

(Page 4).

Police Connect Bandits

(Continued from First Page)

bandits on Saturday included Doylestown officers: Lieut. John J. Hanlon, of the 4th Detective Division, Phila.; State Police Detective Gene Carfagno, and Philadelphia Detectives Allen Kleppinger, Frank McCourt and Lawrence Adair.

Knew Other Gang

The police also learned that several of the bandits were acquainted with the Philadelphia boy murder gang that is now in the Bucks County Prison awaiting trial on a murder charge. Several of the accused asked about their friends as soon as they arrived at the Bucks County Prison.

(Italics supplied)

RELATOR'S EXHIBIT NO. 42.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 18, 1948.

(Page 2).

(Editorial).

TIME FOR AN EXAMPLE

THE OVERFLOW of Philadelphia's young criminals into Bucks county, might, it seems reasonable to believe, be discouraged if the crooks were given sentences which would be impressive and get headlines large enough to be seen and become impressive.

Stiff sentences have had that effect before.

Once before it brought an epidemic of arson to an end for several years.

Another time it taught tramps, who had been filling the county jail and bedevilling the people of lower Bucks, to keep away from the county.

Recent arrests of two gangs of young criminals, one of them held for murder, should help to discourage these criminal forays into the county . . . especially if they are convicted and sent away for impressive periods.

Trying to find excuses for enemies of society invites more crimes.

(Italics supplied)

RELATOR'S EXHIBIT NO. 43

DOYLESTOWN DAILY INTELLIGENCER,
MARCH 1, 1948.

(Page 1).

CHARGED WITH MURDER, ASKS SEPARATE TRIALS

Court Smothered By Dust, Due To Remodeling

Adding New Room

Petitions for severance, asking for separate trials in the cases of David Darcy, 22, and Felix Capone, 16, charged with murder, were filed this morning in court.

- They are two of four Philadelphia youths charged with

the murder of William Kelly, 38, of Trevoise, last December 24, outside the Feasterville Tavern, following a hold-up.

Judges Hiram H. Keller and Calvin S. Boyer asked that the matter be heard in further detail this afternoon, in an effort to have a combination trial if possible, covering all defendants. Counsel for Darcy and Capone, however, stood on their legal rights, and stated that they would ask for separate trials as provided by law in cases of murder.

The court commented, "Separate trials in these cases will mean that it may take a year to dispose of the cases". Attorneys for the other defendants intimated today that they too will demand separate trials.

* * *

(Italics supplied)

RELATOR'S EXHIBIT NO. 46.

DOYLESTOWN DAILY INTELLIGENCER,
APRIL 2, 1948.

(Page 2).

(Guest Editorial).

Mild Sentence for Murder

From Phila. Inquirer.

As a deterrent to criminally reckless automobile drivers, the sentence of two-and-a-half to five years imposed on a man whose automobile killed a woman pedestrian is grossly inadequate.

Judge Oliver rightly ruled that the man involved in the case was guilty of second-degree murder. It is certainly nothing less when a motorist, with a total disregard for the safety of others, uses the city streets as a race course, loses control and sends his car crashing over the sidewalk into a group of women.

Murder, whether with a gun or an automobile calls for

penalties that will properly punish the offender and stand as a clear warning to others. This sentence does neither.

If there were extenuating circumstances, there might have been some excuse for the light sentence. But police charged that this motorist was driving a stolen car, fled the scene of the accident, was racing another automobile, and was intoxicated. Any of these, and especially the last, should have deprived the defendant of any claim to clemency.

It is the safety of the careful, law-abiding majority, rather than any hardships suffered by the guilty drivers, which should be the paramount consideration.

The criminal negligence responsible for the continuing slaughter on the highways will not be cured until all culpable parties know their punishment will be sure, swift and severe.

Light penalties will delay the achievement of real highway safety.

(Italics supplied)

RELATOR'S EXHIBIT NO. 48.

DOYLESTOWN DAILY INTELLIGENCER,
APRIL 17, 1948.

(Page 2).

(Editorial).

IF "SOB SISTERS" LAY OFF

IF "SOB SISTERS" lay off, three of the holdup men who were captured here, with an arsenal in their car, and sentenced in Philadelphia this week for crimes there . . . will be out of circulation and mischief for a term of years long enough to give them time to realize that crime doesn't pay . . . and also serve as a lesson to others:

They were sentenced to from 10 to 30 years in the Eastern Penitentiary by Judge Harry S. McDevitt . . . who commented that they would probably "wind up in the electric chair." The Judge made it clear that he has little hope that characters of their ilk will not learn the needed lesson . . .

and must be restrained from further victimizing the public

"You wise guys start out with guns and usually wind up in the electric chair," added the Judge.

Unfortunately, despite adequate proof that the statement was not an exaggeration in many instances, there still are Judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public.

It seems to be time to stop making guinea pigs of the law-abiding members of society.

(Italics supplied)

RELATOR'S EXHIBIT NO. 49.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 7, 1948.

(Page 2).

(Editorial).

JURORS REBUKED AGAIN

TWICE WITHIN a few months a jury in Philadelphia has been rebuked by a Judge for failing to exercise intelligence in passing upon the guilt or innocence of a defendant.

Once a jury was criticized severely by the Court for its palpably unintelligent or soft-hearted decision in the case of a man accused of the murder of two policemen.

In the other trial this week a jury acquitted a man on a charge of burglary . . . after he had been caught with his arm through a broken window, and in possession of a set of burglar's tools.

The news story did not reveal whether the man's previous

record, including an automobile theft and complicity in a murder was introduced in evidence. The chances are that it was not. But without this, the Judge charged, there was no reason for them to acquit him in the face of the positive evidence said to have been presented.

It makes it more and more apparent that untrained men and women, not familiar with court rules or the proper weighing of evidence, are lacking in temperament or ability to serve efficiently.

For years there has been a discussion over whether there should not be trained professional jurors . . . instead of the "good men and true" supposed to be drafted for the purpose.

(Italics supplied)

RELATOR'S EXHIBIT NO. 51..

DOYLESTOWN DAILY INTELLIGENCER,
MAY 14, 1948.

(Page 1).

**FOUR MURDER AND FOUR MANSLAUGHTER
TRIALS LISTED**

Four murder cases are listed on the docket for the May term of county criminal court that opens next Monday, but only two will be tried during the approaching term.

The two murder cases for trial are those of Harold Foster, 23, and Harry Zeitz, 18, both of Philadelphia. They will be tried for their alleged part in the murder of William Kelly, 38, of Trevoose, last December, when four youths held up a tap room and started shooting after a \$425 robbery.

Two others, David Darcy, and Felix Capone, will be tried later.

Because of the extensive list for the May term, there will probably be sessions of night court during the murder trial.

Relator's Exhibit No: 51

of Foster and Zeitz scheduled to start Monday, May 24.

Foster will be defended at the trial by Attorneys Donald B. Smith, Perkasié, and William Freed, Jr., of Quakertown, both appointed by the court. Zeitz, who is said to be the one who fired the fatal shot that resulted in Kelly's death, will be defended by Attorney I. Louis Rubin, of Bristol.

* * *

The continued cases from the September term of 1947 are listed as follows:

* * * Harold Foster; David Darcy, Harry Zeitz and Felix Capone, murder: * * *

* * *

(Italics supplied)

RELATOR'S EXHIBIT NO. 55.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 24, 1948.

(Page 1)

**FEASTERVILLE MURDER CASE DEFENDANTS
GO ON TRIAL**

The Feasterville Tavern murder cases got under way this morning in county criminal court.

Four youthful Philadelphians are charged with the murder of William Kelly, 38, of Trevoe, who was shot on the night of Dec. 22, 1947, and died several days later.

Only two of the defendants charged with the murder will go on trial this term.

They are 18-year-old, red-headed Harry Zeitz, of Oakland st., Phila., who is alleged to have fired the shot that fatally injured Kelly; and Harold Foster, 23, of Teasdale st., Phila.

The other two defendants, David Darcy, 22, and Felix Capone, 16, will be tried at a later term of court.

The case is being tried before Judge Calvin S. Boyer in No. 1 Court Room.

Zeitz is being defended by Attorney I. Louis Rubin, Bristol, while Attorneys Donald Smith, Perkasje, and William Freed, Jr., Quakertown, are defending Foster. The Commonwealth's case is being prosecuted by District Attorney Edward G. Biester.

Zeitz, dressed in a dark suit and wearing his military discharge button on his coat lapel, and Foster, also neatly dressed in a dark suit, were brought into court by two State Troopers, Corporal Harold Dando and Trooper Leland Emory. Other guards and Sheriff's deputies were stationed nearby as Zeitz and Foster were arraigned before the bar of the court at 10:55 this morning.

The defendants were two of the four who held up the Feasterville Tavern on Dec. 22 and after a robbery of inn patrons eluded police after first firing a shot outside the

(Please turn to Page 4)

RELATOR'S EXHIBIT NO. 56.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 24, 1948.

(Page 4).

Feasterville Murder Case

(Continued from First Page)

tavern—the shot that caused Kelly's death.

All jurors were withdrawn from the court room at 11 a.m. and the long ordeal of examining the jurors individually got under way as one juror at a time was called in.

Jurors Being Examined

John E. Wright, 26, Yardley farmer, was the first juror examined. He was followed by Manass B. Barndt, 69, Sellersville salesman.

Barndt, farmer, was the first juror examined the first juror drawn as to his health, age, occupation, or whether he had formed any opinion in the case.

"I read the story in the newspapers, but I could render an opinion according to the evidence as presented.

"I do not believe in capital punishment."

Wright was challenged by the Commonwealth because of his objection to death penalty.

Manass Barndt told the defense attorney that he was not in good health, and was excused.

Titus Pfeiffer, Quakertown, R. D., carpenter, had his own Bible in his hand when asked to be sworn, and then volunteered that he was not in favor of capital punishment. The Commonwealth's challenge for cause was sustained.

Oswin M. Nase, 73, of Sellersville, retired, told the Court that his hearing is 40 per cent impaired. He was excused.

George S. Schmell, 54, a Plumstead township farmer, and fifth juror examined said his Mennonite faith would not permit his conscience to impose the death penalty. He was challenged for cause.

Mrs. Fannie H. Acuff, 65, Langhorne housewife, was the sixth juror examined and the first woman called. The defendant, Foster, challenged peremptorily.

No jurors had been selected up until 11:30 a. m.

(Italics supplied)

RELATOR'S EXHIBIT NO. 57.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 25, 1948.

(Page 1).

**Only 7 of the 14 Jurors Selected in Murder Case:
Many Oppose Death Penalty**

Kelly Murder Jury

No. 1—Alvin B. Worthington, New Hope, foreman;
auto dealer.

No. 2—George S. Havens, New Hope, farmer.

No. 3—Mrs. Mildred M. Holbert, Warrington, house-
wife.

No. 4—C. Raymond Dager, Forrest Grove, farmer.

No. 5—Mrs. Augusta Gill, Bristol, housewife.

No. 6—Mrs. Catherine W. Danser, Yardley, housewife.

No. 7—John M. Hemphill, Hatfield, R.D., farmer.

Thirty-five men and women were called and examined for jury duty yesterday at the opening of the trial of two Philadelphia youths charged with slaying a man during a holdup at the Feasterville Inn last December 22.

Out of the all-day effort, only six were selected up until

the time that court adjourned Monday afternoon at 5 o'clock. The jury that will try Harry Zeitz, 18, and Harold Foster, 22, is headed by a New Hope automobile dealer who was selected as foreman. He is Alvin B. Worthington, who was the eleventh juror examined.

Court got under way this morning at 10 o'clock and jurors are being called in an effort to complete the panel before adjournment today. Eight more were needed when court opened this morning, including two alternate jurors.

The defendants are charged with the murder of William Kelly, 38, of Trevoise, who was standing near the Feasterville Inn when a shot allegedly fired by Zeitz, struck him, and caused his death two days later in the Abington Memorial Hospital.

Two other defendants will be tried for the same crime at a later term of court. They are David Darcy 22, and Felix Capone, 16, also Philadelphians.

The trial will most likely last the remainder of the week with night sessions scheduled after the testimony gets under way. Judge Calvin S. Boyer is the trial judge.

Records show that the two Phila-

(Please turn to Page 6)

RELATOR'S EXHIBIT NO. 58.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 25, 1948.

(Page 6).

Only Seven Jurors Selected

(Continued from First Page)

delphians on trial are also charged with holdups in Philadelphia, Montgomery and Delaware counties, and in South Jersey. One of the holdups took place at the Bell Corner Tavern, Rhawnhurst, last Dec. 6, when a Philadelphia city fireman was shot and another man injured.

The Feasterville Inn holdup netted the four youths over \$400 in cash and jewelry, and was followed the same night by a holdup in Pennel before the four Philadelphians eluded police and got back to Philadelphia where they were arrested.

Other Jurors

The No. 2 juror selected was George S. Havens, a farmer, living near New Hope.

William K. Nice, Hatfield, was excused because he had conscientious scruples against the death penalty as a number of others had who were examined yesterday.

The first woman selected was *Mrs. Mildred M. Holbert*, wife of Howard Holbert, Warrington purchasing agent, and mother of three children, who told the attorneys and court that she had no objection to capital punishment when the evidence warranted it.

The sacro-iliac condition that has been bothering him and may become aggravated as a result of lengthy confinement, excused *Walter Kuemerle*, retired Andalusia resident.

Mrs. Mabel L. Weiss, 54, wife of a prominent Warminster florist, and the twenty-second to be examined, said the only objection that she had to serving on the jury is that "her husband needs her very badly at home to help in the greenhouse." The Commonwealth exercised a peremptory challenge.

The fourth juror accepted was a Forest Grove farmer, *C. Raymond Dager*.

Mrs. Elizabeth M. Luff, Richboro housewife, was challenged peremptorily by the Commonwealth.

The fifth juror accepted was *Mrs. Augusta Gill*, Bristol housewife.

Mrs. Lillian Harris, of Andalusia, was excused for cause, by the Commonwealth, after she objected to the death penalty. She said she "didn't like it."

Mrs. Catherine W. Danser, of Yardley, was the 35th juror examined and the last called before adjournment Monday afternoon, and was selected as the sixth juror.

Jurors, before adjournment Monday afternoon, were placed in the custody of two tipstaves, *Mrs. Horace E. Gwinner* and *Clarence H. Danenhower*, and until the trial is over, will be quartered at the Doylestown Inn.

Tuesday Morning

Judge Boyer greeted a school boy and girl audience of about 200 from Council Rock and Hatboro High Schools this morning. They are spending the day attending the murder trial. The various operations in connection with selecting jurors for a murder case were explained to the students by Judge Boyer.

The first juror drawn this morning, *Harvey D. Weisel*, Hilltown, was excused because of professional relations with one of the defense attorneys.

The defense challenged *Mrs. Sarah F. Cooper*, of Bristol, peremptorily.

Perker Dehn, 46, New Hope realtor; the 39th juror called was challenged peremptorily by the defense.

A Pennsylvania Railroad foreman, *John Brady*, of Bristol, was emphatic about his disbelief in capital punishment, and was challenged for cause.

J. Wardell Ettinger, Newtown, mill foreman, who knew the victim, *Kelly*, in this case, was challenged for cause.

Ernest Schumann, retired machinery manufacturer of Quakertown, was challenged peremptorily by defense. *James H. Wood*, Morrisville, was likewise challenged by the defense.

Mrs. J. Koehler, Perkasio housewife, the 44th juror called, was challenged for cause.

John M. Hemphill, 71 years old vegetable farmer living on the Bethlehem Pike, near Hatfield, was selected as the No. 7 juror at 11:30 this morning.

(Italics supplied)

RELATOR'S EXHIBIT NO. 57.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 25, 1948.

(Page 1).

MERCY IS OVERDONE

Washington, May 24.—Justice Robert H. Jackson today accused his Supreme Court colleagues of *giving hardened criminals too many chances to get out of jail.*

He filed a sharply-worded dissenting opinion as the court ruled 5 to 4, that a lower court must take another look at the case of an Alcatraz prisoner sent up in 1935 for a 65-year term for bank robbery.

Jackson pointed out that lower courts had turned down four earlier appeals from the convict, Homer Price, of Lansing, Mich., who claims his original trial was unfair.

* * *

(Italics supplied)

RELATOR'S EXHIBIT NO. 59.

DOYLESTOWN DAILY INTELLIGENCER,

MAY 26, 1948.

(Page 1).

Trevose Murder Trial Jurors Being Selected

Up to Last Evening Only Eight Were Accepted

New List Is Called

Zietz-Foster Murder Jury

- No. 1—Alvin B. Worthington, New Hope, auto dealer; foreman.
- No. 2—George S. Havens, New Hope, farmer.
- No. 3—Mrs. Mildred M. Holbert, Warrington, housewife.
- No. 4—C. Raymond Dager, Forest Grove, farmer.
- No. 5—Mrs. Augusta Gill, Bristol, housewife.
- No. 6—Mrs. Catherine W. Danser, Yardley, housewife.
- No. 7—John M. Hemphill, Hatfield RD, farmer.
- No. 8—Mrs. Marion S. Burton, Bristol, housewife.
- No. 9—Elmer F. Smith, of Quakertown, retired.

The third day of the trial of two Philadelphia youths charged with the murder of William Kelly, outside the Trevose Inn last December, got under way this morning at 10 o'clock with 50 new jurors who were conscripted last night.

(Please turn to Page 8)

RELATOR'S EXHIBIT NO. 60.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 26, 1948.

— (Page 8).

Trevose Murder Trial

(Continued from First Page)

by Sheriff H. Raymond Ahlum of Quakertown, and his deputies.

The original venire of 78 jurors was exhausted yesterday afternoon after two days of detailed examination of men and women many whom were challenged for various reasons. When the last juror to be called was examined, just before adjournment yesterday afternoon, the trial group numbered but eight jurors, with six more to go, including two alternates.

When the jury is completed the trial of Harry Zietz, 18, the alleged trigger man in the murder, and Harold Foster, 22, will get under way.

The Commonwealth examined all jurors as to whether they have conscientious scruples about capital punishment.

indicating that the Commonwealth may ask for the death penalty.

It took all day Tuesday to agree upon two jurors, No. 7 and No. 8. They are John M. Hemphill, Hatfield farmer, and Mrs. Marion S. Burton, Bristol.

Seventh Juror Accepted

John M. Hemphill, 71-year-old farmer living near Hatfield, was accepted as the No. 7 juror.

Mrs. Florence Orgill, Doylestown, R.D., was challenged peremptorily by Zeitz's attorney, Mrs. Carrie M. Meck, Richland township, was challenged for cause.

The 50th juror called was John Artim of Bristol, an architectural designer, employed in Trenton. He was challenged peremptorily by Zeitz's attorney.

The last juror examined before noon recess Tuesday was Mrs. Catherine C. Krikory, of Richland township, housewife, who was excused because of a 2-year-old child at home.

Tuesday Afternoon

Mrs. Gertrude A. Miller, Perkasie housewife, challenged by Commonwealth for cause—conscientious scruples.

Mrs. Ruby Lukens, of Doylestown, mother of four children, was the 55th juror excused, because of illness.

Employed in Phila., Arthur Horton, 37, of Newportville, an expeditor in a radio manufacturing plant was challenged peremptorily by defendant Foster.

Daniel Guzmich, of Upper Black Eddy, said he was a Boy Scout leader, a Sunday school teacher and since being

Relator's Exhibit No. 60

old enough to vote and think matters out for himself, he has not believed in capital punishment. He was challenged for cause by the Commonwealth.

Jacob F. Foster, Morrisville builder, was excused by consent of both sides because of business relationship with counsel in the case.

Mrs. Madelon L. Price, Morrisville housewife, was excused because of poor health.

Raymond S. Knight, 43, of Langhorne Manor, a carpenter-contractor, was challenged for cause. He knew the victim and told the court he had formed a definite opinion.

Herman VanKirk, assistant steward of Bristol Elks, who opposes capital punishment, challenged for cause by Commonwealth.

Mrs. Alice L. Pickett, 53, Langhorne R.D. 2; was the 62nd juror questioned, with only 15 jurors remaining on the current panel. At this point Judge Boyer summoned Sheriff H. Raymond Ahlum for special venire forms. Mrs. Pickett was challenged for cause on grounds of her disapproval of death sentence.

Rose T. Foy, of Hatfield R.D., a beauty counsellor, was challenged by the Commonwealth peremptorily.

~~Joseph M. Hillegas, Quakertown farmer, who knows Attorney Freed for defense, was excused on consent of both sides.~~

Mrs. Mary B. Morris, 42, Plumstead township housewife, mother of two children, the 65th juror called, was challenged by Zeitz's attorney peremptorily.

Mrs. Marion S. Burton, 61, Bristol, housewife, and a member of Fallsington Friends, said she did not object to capital punishment, was accepted as No. 8 juror at 3:10 p.m. the 66th juror called.

Special Venire

Judge Boyer issued a special venire of 50 jurors be returned Wednesday morning in an order issued at 4.30 p.m., Tuesday afternoon.

Among the last members of the original panel examined was George R. Colville, Bristol clerk excused for defective hearing.

Charles W. Kirk, 69-year-old Forest Grove farmer, was the 69th juror examined, was challenged for cause. His opinion is fixed, he told the court.

Elsie P. VanVossen, of Bristol R.D. 1, a clerk-stenographer employed by the Reading Railroad in Philadelphia was the 70th juror examined, and was challenged peremptorily by the Commonwealth.

Wednesday Morning

The case got under way at 11 this morning after a delay of an hour as the new jury panel was being prepared.

Lewis L. Keller, of Quakertown, was the first called out of the new panel and was challenged for cause—conscientious scruples.

Elmer F. Smith, of 10 Hellertown Ave., Quakertown, were accepted as the No. 9 juror at 11:15 this morning.

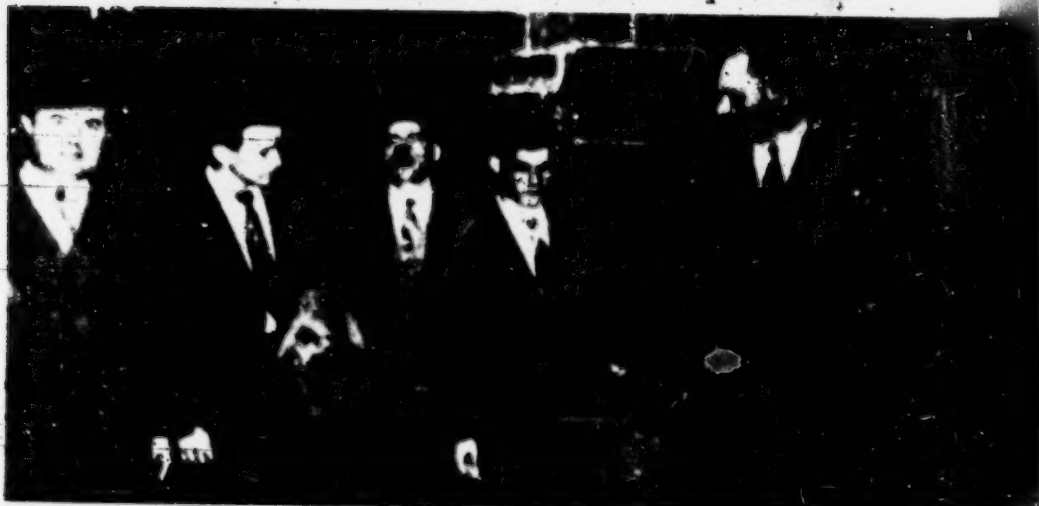
(Italics supplied)

RELATOR'S EXHIBIT NO. 61

DOYLESTOWN DAILY INTELLIGENCER
MAY 27, 1948.

(Page 1).

Murder Defendants on the Way to Court



(Daily Intelligencer News Photo)

Handcuffed to police are two Philadelphia youths on trial in the Bucks County Court House, charged with the murder of William Kelly, Trevese, last December. Left to right: Corporal Harold Dando, commanding officer of the Doylestown sub-station of State Police; Harry Zietz, 18, alleged trigger-man in the slaying; Sheriff H. Raymond Ahlum; Harold Foster, 23, also charged with murder; Trooper Leland Emory, of the Doylestown sub-station; and Deputy Sheriff Harry Ross.

(Italics supplied)

RELATOR'S EXHIBIT NO. 61.

DOYLESTOWN DAILY INTELLIGENCER

MAY 27, 1948.

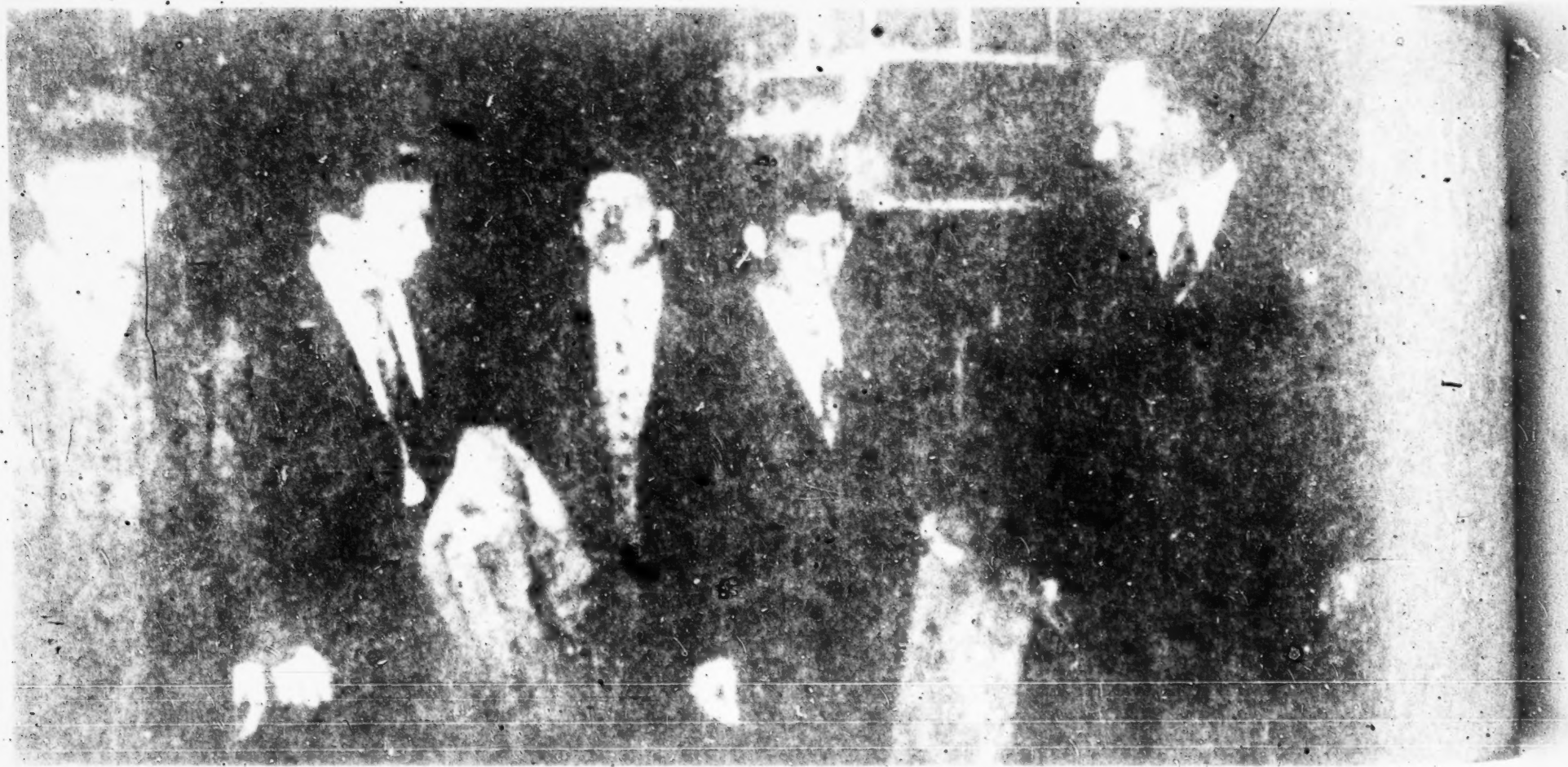
(Page 1).

128 Jurors Called in Murder Trial, But Only 11 Seated

**This Morning Attempt Was Being Made To Get 12th Juror
and Two Alternates From a Special Panel Of 25—Some
Excused Had Been Ill—Farmer Said He Had
"Never Sat That Long."**

ZIETZ-FOSTER MURDER JURY

- No. 1—Alvin B. Worthington, foreman, New Hope,
auto dealer.
- No. 2—George S. Havens, New Hope, farmer.
- No. 3—Mrs. Mildred M. Holbert, Warrington, house-
wife.
- No. 4—C. Raymond Dager, Forest Grove, farmer.
- No. 5—Mrs. Augusta Gill, Bristol, housewife.
- No. 6—Mrs. Catherine W. Danser, Yardley, house-
wife.
- No. 7—John M. Hemphill, Hatfield RD, farmer.
- No. 8—Mrs. Marion S. Burton, Bristol, housewife.
- No. 9—Elmer F. Smith, Quakertown, retired.
- No. 10—Robert E. Billger, Quakertown, athletic field
custodian.
- No. 11—Clifford W. Wright, 41, Newtown, wood-
worker.
- No. 12—Amos Haigh, Quakertown, RD, carpenter.



Relator's Exhibit No. 62

The third panel of jurors—25 in number—reported for duty in criminal court this morning for the Zietz-Foster murder case.

For the second night Sheriff H. Raymond Ahlum and deputies were kept busy searching for jurors who might be willing to serve in the present trial if accepted.

(Please turn to Page 5)

RELATOR'S EXHIBIT NO. 62.

DOYLESTOWN DAILY INTELLIGENCER,
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(Page 5).

128 Jurors Called in Trial

(Continued From First Page)

Gall bladder trouble, heart ailments, disbelief in the death penalty, fixed opinions, business relations with attorneys in the case, children at home, operations, advanced age, religious scruples and a dozen other reasons have so far been advanced by the prospective jurors who have been challenged or excused.

Relator's Exhibit No. 62

At least two war veterans examined as jurors said they were opposed to the death penalty. Another juror said he had been against capital punishment since a boy; another since he started to vote; and still another, since the Lindbergh trial.

An ice cream store owner examined as a juror, said that he would "hate to see his wife alone over the Memorial Day season in that busy store." He was excused.

The fourth day of the trial opened this morning shortly after 10 o'clock and still the case had not been opened to the jury by the Commonwealth. No. 12 juror and two alternates were yet to be selected when court opened this morning.

Eight jurors were selected Monday and Tuesday and three yesterday.

The last juror examined yesterday afternoon before adjournment and the exhaustion of the second panel was J. Roland Leatherman, Doylestown clothing store salesman, who was challenged for cause after informing the court that he had a "fixed opinion" about the case, that he was quite sure could not be changed.

About 15 minutes before the last juror had been called Judge Calvin S. Boyer directed that the third venire be prepared.

When the case is opened two Philadelphians, Harry Zietz, 18, and Harold Foster, 22, will go on trial for the murder of William Kelly, 38, well known resident of Trevoze. Kelly was shot while standing outside the Feasterville Inn, on the night of December 22. The Commonwealth alleges that Zietz is the trigger-man in the case.

A total of 128 jurors had been examined when court adjourned yesterday from which 11 had been accepted.

No. 12. Almost!

A twelfth juror was actually seated yesterday afternoon, but not for long.

She was Miss Marie Lechien, 49, a registered nurse living in Sellersville. As the 101st juror examined, Miss Lechien said, she had no conscientious scruples against capital punishment, and was passed by the Commonwealth. The defendant Foster passed the juror and so did Zietz—and Miss Lechien was seated in No. 12 chair.

Court then recessed for 10 minutes before starting on the alternate hunt. During that recess the court was informed that Miss Lechien had recently undergone an operation and that she might not be physically able to stand a long trial.

When the jurors returned to their chairs, Judge Boyer questioned Miss Lechien about her physical condition. The nurse informed the court that she had recovered sufficiently she was quite certain.

Miss Lechien said that she could sit for an hour at a time she was sure. The court informed the juror that it would be necessary to sit for longer periods of time than that during the trial. The juror informed the court that she had an air cushion with her and was certain she would be okay.

Judge Boyer, upon agreement of counsel on both sides, took no chances and excused Miss Lechien. That left No. 12 vacant again, and examination of jurors continued.

Robert E. Billger, 56, custodian of the Quakertown High Athletic Field, was selected as No. 10 juror.

The No. 11 juror—Clifford W. Wright, 41, a woodworker, was accepted Wednesday afternoon at 2 p.m. His home is in Newtown.

"Never Sat That Long"

"I never sat that long." Morris Rotenberger, 42-year-old Trumbauersville farmer, answered Assistant District Attorney Williard S. Curtin in answer to a question: "Is your health such that it might be affected by being detained here for several days in the trial of this case?" The juror was challenged peremptorily by defendant Foster.

"Here is certainly an industrious man," commented the Court.

Ex-Eastern "Pen" Guard

William Wallace, 49, of 523 Swain St., Bristol, a dye-worker and former guard at the Eastern State Penitentiary, informed the court that he had been in poor health. He was excused.

"Second-Panel" Challenges

Others challenged for cause in the 2d panel were: Nathan Wiser, Jr., Dublin; Charles E. Walp, Quakertown; Ray Z. Hartman, Quakertown; Stanley A. Styer, Perkasio, business reasons; Mrs. Minnie Mitman, Perkasio, R.D., business reasons; Raymond C. Jones, Bristol; George Melvin Keyser, Sellersville; John Edge, Quakertown; Warren Rosenberger, Doylestown; Ardie W. Snyder, Jr., Quakertown; Morris Savidge, Newtown; Elmer Yoder, Quakertown; George F. Kooker, Quakertown.

Others charged peremptorily in the 2d panel were: Fred Bebbington, Yardley; Charles L. Headman, Quakertown RD 1; Leroy E. Dixon, Trumbauersville; Albert A. Bliss, Jr., Doylestown; Raymond B. Geiger, Milford Square; Wil-

lard R. Nase, Trumbauersville; Morris Rotenberger, Trumbauersville; Oliver A. Jarrett, Quakertown; Jacob F. Crouthamel, Plumsteadville; Walter Wasuirka, Bristol; Michael Riola, Bristol; Walter Derstine, Sellersville; William McCahan, Bristol; Clinton R. Greenlee, Newtown.

Thursday Morning

Mrs. Margaret H. Gaine, of Newtown, the first juror called in the third panel this morning was excused because of ill health.

Merton Meck, Quakertown cab driver; Harold Moyer, Perkasio, were also eliminated, the latter being related to counsel in the case. Howard H. Weirback, Quakertown, was next challenged.

Mrs. Arline P. Jenkins, 27-year-old Quakertown housewife, and mother of a 3-year-old child, who is studying hair-dressing, was accepted by the defense, but challenged peremptorily by the State.

Amos Haigh, 66 year old carpenter living in Quakertown R.D. and the 136th juror examined since the trial got under way, was accepted as the No. 12 juror by both sides at 11:40 this morning. Haigh said he had no objection to the death penalty.

(Italics supplied).

RELATOR'S EXHIBIT NO. 63.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 28, 1948.

(Page 1).

**Jurors Visit Murder Scene. Testimony Is Underway:
Landlord Identifies Three**

John R. Naysmith was on the witness stand this morning at the opening of the fifth day of the trial of two members of a Philadelphia boy-bandit gang that killed a Trevoose man, made a cripple out of another man for life, and injured several others in a holdup at the Feasterville Inn last December 22.

Naysmith is the proprietor of the Feasterville tavern where the holdup took place. He was behind the bar the night that some eighteen patrons were looking at television when four youthful bandits, including Harry Zietz, 18, and Harold Foster, 23, started shooting after holding up the customers and the tavern till.

Jury Visits Scene

It took three and one-half days to draw the jury of four women, eight men and two alternates. District Attorney Edward G. Biester opened to the jury last night at 5 o'clock,

after the jury had visited the scene of the crime at Feasterville.

District Attorney Biester briefly summed up the highlights of the prosecution in his opening address to the jury. He left little doubt in the minds of those who heard him that when he makes his next speech to the jury the Commonwealth will ask for the death penalty.

"We will show you that Zietz fired two shots in the air after holding up the inn and that one of them hit Kelly," Mr. Biester said. He also described the shooting inside the tavern where one man was rendered a cripple for life.

"After we produce all our testimony and there will be a great deal of it," Mr. Biester continued, "I will have something else to say to you. At that time we shall argue to you what should be done with the defendants."

The crippled man who was one of the victims of the Feasterville holdup will be a Commonwealth witness.

Zietz and Foster are charged with the killing of William Kelly, 38; of Trevoise, who died in the Abington Memorial Hospital, two days after the pre-Christmas shooting. Kelly was a highly-respected citizen of his home community and was employed by a contractor.

Alternate Jurors

The two alternates selected yesterday afternoon are Bruno Bobiak, 60-year-old Richlandtown farmer, and Francis E. Rantz, 65-year-old investigator for the Federal Bureau of Labor Statistics, living in Quakertown.

With the completion of the jury, the motion filed by District Attorney Biester that the jury be taken to the

(Please turn to Page 4)

RELATOR'S EXHIBIT NO. 64

DOYLESTOWN DAILY INTELLIGENCER,
MAY 28, 1948.

(Page 4).

Jurors Visit Murder Scene

(Continued from First Page)

scene of the crime, was allowed. Judge Boyer accompanied the jurors.

Defense attorneys, I. Louis Rubin for Zietz; Donald B. Smith and C. William Freed, Jr., for Foster, asked the court that the defendants be allowed to view the scene of the crime because the Peasterville Inn had undergone alterations since the holdup and shooting. Judge Boyer denied the motion for the time being, but said that, if the trip could be arranged for the defendants to view the scene without delaying the trial, the motion might be granted.

It took exactly 147 jurors to get the 14 required for this trial. It took 17 hours of questioning. It will take night court sessions to get through in reasonable time, which some consider another week. There was a session of court last

night, may be one tonight, and there will be court Saturday morning.

The jurors will be given a holiday Sunday and Monday, but a holiday under the careful surveillance of tipstaves and court officers. A bus trip has been planned for the jurors on Memorial Day. Then back to the grind next Tuesday morning at 9:30.

The jury was sworn in at 2:15 yesterday afternoon. Court recessed until 5, then the D. A.'s opening and another recess until 7:30 p. m.

First Witness

The first witness called last night was William S. Erwin, a registered engineer living in Langhorne. He identified and described a number of drawings of the scene of the crime and the surroundings. Marion E. Whipps, Bristol photographer, likewise, identified photographs of the inn where the shooting took place.

In the court room last night were Foster's mother and father and his brother. They were seated about 50 feet from the two defendants, where they listened attentively as one of the Commonwealth's main witnesses took the stand. He was John R. Naysmith, 34, who testified partially last night and then took the stand again this morning.

Naysmith identified the photographs of his Feasterville tavern as displayed by a previous witness. He said that he was in the taproom from 6 p. m. the night of December 22, and that patrons, about 18, were in the bar room and shuffleboard room adjoining.

"I saw Zietz and Foster in front of the bar", Naysmith said. "I also saw David Darcy there."

• David Darcy, 22, and Felix Capone, 16, are the other two youths charged with the Kelly murder. They will be tried at a later date.

Holdup Described

"I was serving beer in the bar; I turned about and saw Foster with a gun in his right hand pointing at me . . . he was standing near the cash register and said, 'get 'em up; this is a stickup'.

"Foster went out to the kitchen and brought my wife in and stood her beside me.

"Then eight or ten shots were fired in the bar-room. Foster then turned to Zietz and asked him to keep two others covered, and then Foster went to the cash register and took out the money.

Crippled For Life

"I heard Foster demand all patrons to put their wallets on the bar. I saw Alan ("Reds") Hellerman lying on the bar-room floor; he had been shot".

Hellerman was crippled for life. He will be a witness for Commonwealth. Hellerman, 45, lives at 3453 Palmetto st., Phila.

Second Man Shot

Another man shot is Edward Wunsch, 25, Buck rd., Feasterville.

Naysmith continued his testimony:

"I heard Miss Winnie Wiley, 32, 8300 Verree rd., a friend of Hellerman, run to his side.

"Miss Wiley said, 'Oh, Reds!! What have they done to you?'

"'Don't bother lady', Foster said, 'He's dead'."

Naysmith said that Zietz and Darcy also had guns in their hands.

"Foster asked me for my wallet and I handed it over. Naysmith continued, 'Foster opened the wallet and then said, 'What! Only a lousy deuce.' Then they took watches from some of the patrons. Darcy took the watches.

"Zietz, with his gun had the customers lined up against the wall.

"Then I heard one bandit say, 'Let's get the hell out of here'. Foster looked over the bar first and took a bottle of whiskey off the bar, and jumped over the bar with whiskey in one hand and a revolver on the bar. Then Foster kicked Hellerman, who was lying on the floor, and said, 'He ain't dead yet, he's breathing'.

"Then Darcy fired two shots at the telephone mouthpiece.

"Foster said, 'I don't want you to move for some minutes', and, as he went out the door, said, 'I wish you all a very, very Merry Christmas'. Then the three defendants left the place.

"Everybody stood still for a time and then somebody went outside to Buck Hotel to call for an ambulance. The telephone was not working.

"The Bucks County Rescue Squad took Hellerman to the hospital.

"There was \$78 taken out of my cash register.

"I heard Darcy ask where the hero was that hit me. He also said, 'Where are the police; I feel like shooting a couple of them'."

The State called for cross-examination at this point.

Cross-Examination

Attorney Smith, for Foster, cross-examined Naysmith first.

"I heard shots fired but didn't see who fired all of them. I saw Foster fire but two shots, and I didn't see Hellerman at all."

The witness said that Zietz took no part in emptying the callets. The defense attorneys finished their cross-examination of Naysmith at this point.

Mrs. Naysmith Testifies.

Mrs. Florence Naysmith, wife of the tavern proprietor, testified she was in the kitchen and that Foster came out, pointed a gun at her and ordered her out to the bar room with her husband.

"I heard more than six shots fired", Mrs. Naysmith testified. "Foster fired two shots in the direction of the door. Then I saw Edward Wunsch fall to the floor."

"I saw blood running out of Hellerman's neck . . . He was on the floor."

(Italics supplied)

RELATOR'S EXHIBIT NO. 65.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 29, 1948.

(Page 1).

**HEARD FEASTERVILLE BANDITS Say They Would
Also Like to Have Shot Some Cops**

The horror of Feasterville's tavern-murder during last year's Christmas season, when an innocent outsider was fatally shot, is being related in detail again today in Bucks county criminal court.

The spectacle of a quartet of wise-cracking trigger-happy young bandits who invaded the Feasterville Inn last Dec. 22, at night, shooting down patrons "just for the fun of it," was described from the mouths of numerous Commonwealth witnesses all day yesterday.

They testified in the murder trial of Harold Foster, 23, and Harry Zietz, 18, both of Phila., of the hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later.

The sixth day of the trial got under way this morning

Relator's Exhibit No. 65

Court adjourned at noon today until next Tuesday morning. The jurors will remain together.

Eddie Wuensch Testifies

One of the leading Commonwealth witnesses Eddie Wuensch, 26-year-old Feasterville sheet metal worker, took the witness stand this morning.

Wuensch said he was in the shuffleboard room at the tavern, when David Darcy, one of the bandits yet to be tried, came in and fired two shots.

"I was scuffling with Darcy and all of a sudden I felt something hot in my right arm and left shoulder." Wuensch testified. "Lots of shots were being fired. I was later taken to the hospital.

"They left me come home for Christmas, but I had to go back to the hospital for an operation after Christmas; but the operation was not successful in removing one the slugs in my shoulder.

"Before I was shot I saw neither Zietz nor Foster—they were in the adjoining barroom."

The witness Wuensch testified that after an operation on his back he had to take a six weeks' rest,

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RELATOR'S EXHIBIT NO. 66.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 29, 1948.

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HEARD BANDITS SAY

(Continued from First Page)

and that pains in his back constantly prevent him from doing the type of work he has been doing.

Another witness this morning was Howard Polmateer, of Holland, a patron the night of the holdup, who described what he saw.

The defense attorneys asked no questions of the witnesses Wuensch and Polmateer.

Frank Fronsedale, 45, of Feasterville, a painter, testified he was in the tavern with George Roth and saw Zietz and Foster at the bar.

"I saw Foster jump over the bar, pull a gun and declare it was a stickup—he had a gun in his hand and he swung it toward the bartender.

"I heard 2 shots from the shuffleboard room. Then a fist fight started, and more shooting started. I saw Darcy shoot

Relator's Exhibit No. 66

Eddie Wuensch. Zietz, too, shot at Wuensch. Zietz fired 2 shots that I saw. Other shots were fired from the back of the bar.

"I saw Darcy fire two shots into the telephone mouth-piece, and heard one of the three holdup men say he wished some cops would come in so he could shoot them up."

James Brown Testifies

James Brown, 67, of Feasterville, owner of the building where the holdup occurred, and an uncle of John R. Naysmith, the proprietor, testified that he "put his hands up, the same as the others did", after he had served a beer to Foster.

"Foster pointed a gun at me as well as the rest of the people," Brown testified. "Hellerman and Darcy were scuffling in the bar. I saw Foster take deliberate aim and fire 2 shots in direction of Hellerman and Darcy.

"I saw at least 3 shots fired by Zietz's gun in the same direction, and I saw Hellerman fall. Edward Wunsch was also in the scuffle. Zietz shot 3 times in succession before Foster fired."

Brown testified that he saw Kelly lying on the ground outside the tavern after the holdup.

Very few questions were asked in cross-examination.

"After Foster fired his gun, Hellerman fell to the floor," Brown testified. "I could not tell which shots hit Hellerman."

Other Holdup Witnesses

Mrs. Gertrude Raistrick, 43, of Feasterville, testified that she and her husband were in the tavern looking at tele-

vised fights on the night of Dec. 22 between 10 and 11 P. M. Virginia Stickel also accompanied the Raistricks.

"I saw Zietz shoot Eddie Wunsch and I saw Darcy fire shoots too", the witness said. - "When Foster fired, I had to dodge or I'd have gotten it," Mrs. Raistrick added. The latter part of this testimony was ruled out.

"Zietz fired first", Mrs. Raistrick continued.

"Then Foster fired two shots that I saw, and Hellerman fell and I fell too. I saw Darcy reload his gun in front of me."

Mrs. Raistrick said that Foster looked at her wedding ring and said, "Oh, you're married, we don't want that ring."

Harrison Raistrick, 53, husband of the previous witness, corroborated his wife's testimony. He said he saw Zietz fire directly at Eddie Wunsch.

"I can account for about 10 shots fired inside the tavern," Harrison Raistrick testified. "I put \$8.03 on the bar. Foster was taking money out of the wallets, putting it in his pocket. Zietz was at the door with a gun covering the patrons."

"Zietz picked up Hellerman's hat and put it on his head, and said, 'You won't need that where you're going'. Hellerman had been shot and was lying on the floor, in a bleeding condition."

"I knew the victim Kelly for about 16 years. I saw him laid out at the funeral parlor."

Another Eye Witness

Virginia Stickel, of Feasterville, another patron at the tavern, testified "they were all waving guns at us."

"I don't know which defendant it was, but one of them came back in the barroom, looked at the Christmas lights and wished us all a very Merry Christmas," Miss Stickel testified. "I couldn't tell where the shots came from; they were all shootin'."

George Roth Testifies

George Roth, Myrtle ave., Feasterville, testified that he went to the Feasterville Inn with a friend, Frank Frosndale to see the television.

"Darcy came over to me, put a gun in my side and said, 'This is a stickup', Roth testified.

"Eddie Wunsch was punching Darcy and Darcy was shooting at Wunsch. Darcy fired 4 shots in quick succession. Zietz fired at least 3 shots at Wunsch and at Hellerman.

"Darcy and Zietz then opened and reloaded their guns. I would approximate that 11 or 12 shots were fired in the barroom."

Elmer Woldeck, a Poquessing ave. gas station attendant, was in the tavern with his boss the night of the holdup. He testified that 10 or 12 shots were fired.

The Commonwealth's eleventh witness was Maurice Phillips, 35, Poquessing ave., Somerton, employer of the witness Woldeck, who gave corroborative testimony as to the holdup.

(Italics supplied)

RELATOR'S EXHIBIT NO. 67.

DOYLESTOWN DAILY INTELLIGENCER.
JUNE 1, 1948.

(Page 1).

**"Why Did They Shoot Me?" Murdered Man Asks After He
Was Victim in Feasterville Shooting**

Crippled for life, a 46-year-old Philadelphian, was wheeled into court this morning on an invalid chair.

From his station next to the witness stand, Alan Hellerman, the invalid witness, pointed his finger of identification at the two accused defendants in the murder trial of Harry Zietz, 18, and Harold Foster, 23, charged with the pre-Christmas slaying of William Kelly, 38, of Trevoise, on the night of Dec. 22, outside the Feasterville Inn.

This is the seventh day of the trial before a jury of 4 women and 8 men in Judge Calvin S. Boyer's Court.

Hellerman was playing shuffleboard in a side room of the inn when David Darcy, 22—who will be tried later—came in and fired two shots.

"I scuffled with Darcy, Hellerman testified, "and then Zietz put his gun over Darcy's shoulder and fired at me

The bullet hit me in the neck and I fell to the floor. Then I heard one of bandits say, 'Hell, he's not dead yet, he's still breathing.'

I was conscious all the time I was on the floor. Foster kicked me before they left the place. I think Foster was the last man out.

I was removed by Bucks County Rescue Squad to the Nazareth Hospital and transferred to Temple Hospital where I remained 4 months. I have been home 4 weeks.

"I have pain all of the time in my legs. I no longer have normal control of my organs. I can move my hands but not my legs."

No Questions

No questions were asked by the defense attorneys. Hellerman was questioned for 30 minutes by District Attorney Edward G. Biester.

Hellerman was accompanied this morning by Mrs. Winnie Lewtwyler, of Fox Chase, who was at the Feasterville Inn with him the night of the holdup.

Horace Patterson, of Feasterville Pike, a mail clerk, was called as the 18th Commonwealth witness this morning. He was standing with the victim Kelly, together with a friend, Frank Walter when Kelly.

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RELATOR'S EXHIBIT NO. 68.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 1, 1948.

(Page 4).

"Why Did They Shoot Me?"

(Continued from First Page)

was shot as the fleeing bandits left the Feasterville Inn.

Woman Testifies

Testimony late Saturday morning was given by Mrs. Winnie Lewtwyler, of Fox Chase, who stated that she had been playing shuffleboard and had left the tavern after trouble started. She said that she saw William Kelly, the murdered man, outside the building.

Mrs. Lewtwyler said that when she learned that a holdup was under way she ran to the Buck Hotel and told the proprietor to call police.

Frank Walter Testifies

Frank Walter, 29, of Feasterville, a friend of the victim Kelly, stated that he saw Kelly at 11 p.m. at the Buck Hotel.

Relator's Exhibit No. 68

on the night of the holdup, and was talking to him for some time.

"About 11.25 Mrs. Lewtwyler rushed into the hotel and said there was a shooting at the Feasterville Inn", Walter testified. "She was hysterical and ran.

"Kelly and I went down the road and were standing at an intersection near the Feasterville Inn, talking about the reported holdup. Right then we were not certain about there being a holdup.

"There was an automobile parked in front of the Feaster-ville Inn, with the front grille of the car pushed in.

"One of the men got in behind the driver's seat of the car and the other man got in the other side, in front. The car remained there a minute and the lights were turned on and off, only one light worked. The motor of the car was running.

Describes Shooting

"Then the car started up the Newtown road. As the car passed us I noticed two sharp flashes from the driver's window, two orange-like flashes, and a noise like a revolver shot.

/ "Kelly fell to the ground.

"We were not over 10 to 20 feet away from the car when the shots were fired. Kelly was bleeding from the back of his head. Patterson ran to get help and the bandit car continued on.

"Kelly was not conscious after he fell, but he did regain consciousness a few minutes later and said: 'Who were they? Why did they shoot me? Look! I'm paralyzed'.

"Then we took Kelly to the Abington Memorial Hospital. I next saw Kelly in the hospital on Christmas Day. And he was dead."

Relator's Exhibit No. 70

Under cross-examination by Attorney Donald Smith, Walter said he did not see any other men in the *bandit car*.

Patterson described the shooting of Kelly vividly. He told the court and jury that the shot that felled Kelly was fired from the driver's seat of the *bandit auto*.

(Italics supplied)

RELATOR'S EXHIBIT NO. 70.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 2, 1948.

(Page 1).

Zietz Admits Firing Two Shots Out of Auto

Kelly Murdered Man, Hit By Two Bullets From Car

Persons In Feasterville Inn, Besides Those Shot, Had Narrow Escape, They Testified—Two Witnesses Said They Did Not Think The Defendants Were Intoxicated

"You ought to try this some time . . . it's a lot of fun," a 16-year-old Philadelphia boy-bandit, remarked to patrons

of Deacon's Inn near Penndel during a pre-Christmas holdup last December, less than 30 minutes after a hold-up and murder at nearby Feasterville.

The trigger-happy bandit was Felix Capone, the youngest of four Philadelphians charged with the murder of William Kelly, 38, of Trevoise. The others are Harry Zietz, 18, and Harold Foster, 23, now on trial before a jury of four women and eight men in Judge Calvin S. Boyer's court, and David Darey, 22, who will be tried later.

The statement made by young Capone during the Deacon's Inn holdup was related yesterday during testimony offered by Joseph Gersch, 24, a Penndel farmer who was at the inn when the holdup took place.

The eighth day of the trial got under way this morning, after a session of night court last evening that was attended by several hundred spectators.

Slowly, but carefully, the Commonwealth is leading up to the point when it will ask that the jury demand that Zietz and Foster pay with their lives for the death of William Kelly.

During most of the testimony up until the present time the defense attorneys, C. William Freed, Jr., Donald Smith and I. Louis Rubin, have asked very few questions in cross-examination. District Attorney Edward G. Biester and his associate, Willard S. Curtin, have thoroughly examined every witness. Highlighting last night's testimony was that given by Lieut. John J. Hanlon, of the Philadelphia

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RELATOR'S EXHIBIT NO. 71.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 2, 1948.

(Page 81).

Zietz Admits Firing 2 Shots

(Continued from First Page)

Detective Division, who interviewed the defendants after their arrest in Philadelphia, and received from them an oral and a written statement.

The written statement will be offered in evidence today. "They admitted to us that they were responsible for the Feasterville and Penndel holdups", Hanlon testified.

"Harry Zietz told us that the four of them left Philadelphia on December 22 about 11 p.m. and came to Feasterville Inn. They told us that Capone remained in the car and the others went inside the inn. Zietz said they got some beer first and then Foster 'took' the cash register and declared a holdup.

"Zietz told me that he fired two shots over the head of Darcy, at two men who were scuffling in the center of the floor; that when they left, Darcy and Zietz got in the car first and Foster then followed.

Relator's Exhibit No. 71

"Zietz told me orally that he fired two shots out of the automobile car window as they left the Freasterville Inn, and that he didn't know what happened, but that they then drove to Deacon's Inn and held up that place."

"D. A." Reads Statement

Assistant District Attorney Curtin then read the statement to the jury, an 8-page, typewritten document.

Excerpts from statement:

"Zietz drove the car, it was his . . . Foster had a 32-20 foreign make gun in the Feasterville Inn . . . I had a 32 caliber gun . . . I fired several shots.

"Harry Zietz drove the car . . . As I pulled away, I fired 2 shots (Zietz talking) . . . I fired the shots because someone said that someone was coming out of the inn . . . The ammunition was bought by Zietz in a Phila. sporting goods store . . . The guns used in the holdups were our own . . . All four defendants said everything in the statement was true . . . The statement was read to Capone who cannot read."

Tuesday Testimony

Mrs. Elizabeth L. Hogeland, who lives near the Freasterville Inn, testified that one of the bullets fired from the automobile went through a window in her house and struck a stone wall inside, and ricocheted to a door.

Medical Testimony

Dr. Charles F. Laycock, resident in surgery at Abington Memorial Hospital, testified that he treated Kelly in the

receiving ward and that the victim had two wounds in the right temple area.

Dr. Laycock described the operation performed on Kelly and said that Kelly died the night of Dec. 24, Christmas Eve. Kelly's skull was fractured, the witness said.

Dr. Smith Foushee, interne at Abington Hospital, corroborated Dr. Laycock's testimony.

Coroner's Physician Testifies

Dr. John C. Simpson, 920 Swede st., Norristown, coroner's physician of Montgomery county:

"I performed an autopsy on Kelly's body on Christmas Day, 1947", Dr. Simpson testified.

Cause of Kelly's Death

The direct cause of death was a hemorrhage caused by a fractured skull, the coroner's physician testified.

Deacon's Inn Holdup

Joseph Gersch, 24, a farmer living near Penndel.

"I was at Deacon's Inn about 11:45 p.m. the night of Dec. 22" Gersch testified.

"Four of us were playing shuffleboard when three fellows came in.

"Just about 12 midnight, Zietz, Foster and Darcy came together. I looked up and saw Foster behind the bar.

"Then I saw Darcy with a gun and pointing it at the proprietor and said 'this is a stickup', and ordered us to take out our wallets and money, Zietz was standing nearby Darcy took money and put it in pocket.

"Then Felix Capone came in (a 4th one accused of the same crime). ~~Darcy gave Capone his gun.~~

"Capone said to us (he is 16); 'you ought to try this sometime; it's fun'. One of the fellows was playing the piano. Zietz then fired a couple of shots in the barroom ceiling as they left. One shot just missed a Mrs. Valeria Lachenman, who was inside.

"When Darcy came in the barroom he told us that he had just shot shot a couple of men at another place.

"They robbed us of our money and watches."

Defense Attorney I Louis Rubin for Zietz, objected to Checchias' testimony as being merely of an accumulative nature, and asked it stricken from the record.

Judge Boyer overruled the motion and further stated that any testimony as to the second holdup would tend to weigh details as to the extent of the punishment in this case.

Bandits Not Drunk

On cross-examination by defense Attorney Bubin, Checchia stated in his opinion the defendants were not drunk.

Officer Bowman Testifies

Patrolman William Bowman of the 27th District, Phila., testified that he spied the bandit car and stopped it at Frankford ave., and Friendship st. Patrolman Steven Melnic was with him.

Patrolman Bowman identified all guns, stolen watches and other things found in the Plymouth 2-door sedan.

The bandit car that was stopped at 1.17 A.M. Dec. 23, belonged to the defendant Zietz, Bowman testified. The witness said none of the defendants appeared intoxicated.

Deacon Inn Patron

Angelo Spadeccino, 25, Woodbourne, testified that he arrived at Deacon's Inn at 11 P.M. on Dec. 22.

"I saw Foster and Zietz at Deacon's Inn," Spadeccino testified. "I was playing shuffleboard with friends, and I first saw defendants—*Foster, Zietz and Darcy*—shortly after midnight.

"*Darcy* said 'off with your watch. Don't try and get funny, we just shot three fellows down the road.' *Darcy* played the piano. Foster ripped the telephone off the wall. Then Capone took over. A shot was fired in the direction of Mr. and Mrs. Fred W. Lachenman, by Foster.

Hellerman's Operation

Dr. Michael Scott, of the surgical staff of Temple University, testified that he performed an operation on Alan Hellerman, who was, before court in a wheeling chair earlier on Tuesday. He removed the bullet from Hellerman's spine and placed it in a test tube which was presented in evidence.

(Italics supplied)

RELATOR'S EXHIBIT NO. 72.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 3, 1948.

(Page 1).

Prosecutor's Plea

"Morally these boys, Zietz and Foster, killed three men the night of the Feasterville holdup", District Attorney Edward G. Biester, in his summation to the jury declared this morning.

"William Kelly was mortally wounded by a shot from the bandit gun, and the two others were horribly crippled, one for life", Mr. Biester continued. "Even a surgeon's knife cannot restore one of the victims to normal life."

The District Attorney also emphasized the fact that the defendants' callousness was outrageous when the bandits wished the victims of a holdup, "a Merry Christmas" before leaving the Feasterville Inn shooting escapade.

"Not satisfied with the Feasterville affair, they went to another place the same night and held it up with guns. What one did, was the attitude of all".

(Italics supplied)

RELATOR'S EXHIBIT NO. 72.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 3, 1948.

(Page 1).

Defense in Murder Trial Decides Not to Offer Evidence

Feasterville Bandits May Know Their Fate Late Today

**"NO, YOUR HONOR". IS RESPONSE OF DEFENDANTS
WHEN COURT ASKS IF THEY WISH TO TESTIFY**

**—Zeitz's Revolver is Identified as the One Which Fired
the Fatal Bullets, Expert Testifies**

Whether they must pay for their sensational 30-day crime spree that ended in a murder, by going to the electric chair, or by serving life imprisonment, or less, will probably be known late today by two Philadelphia youths on trial for the slaying of William Kelly, 38, of Treose, last December.

Relator's Exhibit No. 72

The trial rapidly approached an end this morning at the opening of the ninth day, when the defense announced that no evidence would be presented in behalf of Harry Zietz, 18, and Harold Foster, 23, the co-defendants charged with murder.

The Commonwealth rested yesterday afternoon at 4:55 and court opened at 9:30 this morning.

After the announcement had been made by Attorney Donald B. Smith, for Foster, and by Attorney I. Louis Rubin, for Zietz—that no evidence would be presented in their behalf—court took a recess until 10:30 this morning in order to give District Attorney Edward G. Biester time to confer with his associate before he opened to the jury first with his summation of the case for the Commonwealth.

As a matter of record, Judge Calvin S. Boyer, who is trying the case, asked both defendants separately whether they desired to testify, and both replied in a clear voice—"No, your honor".

Foster, who is said to be entitled to wear 14 battle stars, is a Navy veteran who fought in numerous major sea battles. Zietz served with the Army, but not during the war.

Under the present set-up, with no evidence offered by the defense, the District Attorney's summation, coming first, will be followed by the summation, by the defense attorneys. Then the District Attorney will be permitted to reply be-

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RELATOR'S EXHIBIT NO. 73.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 3, 1948.

(Page 6).

Defense in Murder Trial.

(Continued from First Page)

fore Judge Boyer gives his charge to the jury.

Judge Boyer said this morning that he would prefer to charge the jury Friday morning, but that he may charge this afternoon if the attorneys on both sides can complete their summations by noon.

Commonwealth Rests

The Commonwealth rested yesterday afternoon at 4:55 at the close of the eighth day of the trial, when District Attorney Edward G. Biester informed the court that there would be no more testimony for the prosecution for the time being. Court adjourned until 9:30 this morning.

Relator's Exhibit No. 73

Yesterday's testimony included the presentation of oral and written statements by the defendants.

Seven shootings, one a fatal affair, during a 30-day hold-up spree, were enumerated in court as the written documents were read by Assistant District Attorney Willard S. Curtin.

NINE HOLD-UPS

Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zietz, Foster, Darcy and Capone.

In sequence the hold-ups were recorded as follows:

Hold-up of Ralph and Jim's Cafe, White Horse pike, Waterford, N. J., on Nov. 30, 1947, when each bandit got about \$18, and shots were fired in the floor.

Holdup of Old Coin Inn, White Horse pike, Hammonton, N. J., on Dec. 3, 1947, when about \$586 was stolen, with all bandits armed.

Holdup the same night, Dec. 3, 1947, at Mary's Tavern, Maple Shade, N. J., when over \$100 was taken from patrons and the cash register, but no shots fired.

Holdup at Bell's Tavern, 8300 Bustleton Pike, Phila., December 6, when three people were shot, including a Philadelphia city fireman, who was badly crippled. Money stolen from patrons, and bandits escaped through a broken window.

Holdup at Poplar's Inn, Lincoln Highway, opposite the Langhorne Speedway, on December 9, when between \$30 and \$40 was stolen in addition to some liquor.

Holdup at Wolf's Tap Room, December 13, at Elkin's Park, Montgomery county, when \$600 piece was divided and one man was shot. In this holdup Darcy sang through the radio

microphone for the patrons before a holdup order was announced.

Holdup at a cafe at Woodlyn, Ridley Park township, Delaware county, on Dec. 17, 1947, when \$122 in cash was stolen from the cash register in addition to a diamond ring and other jewelry from patrons.

Then followed the two holdups and the murder of Kelly and the shooting of two others at the Feasterville Inn and Deacon's Inn, at Penndel on the night of December 22.

Ballistic Expert

Lieut. George R. Spangler, of Phila., head of the ballistic laboratory of the Philadelphia police department, and one of the outstanding authorities in this country on firearms was called as the last Commonwealth witness yesterday.

His last testimony was an opinion expressed in which Lieut. Spangler testified that a bullet taken from the body of the victim, William Kelly, who died on Christmas Eve last year, was a 32 caliber type bullet. It had previously been testified that Zietz used the type revolver that fired a bullet of that caliber the night Kelly was shot.

The witness also testified that one of the guns used by the bandits was a U. S. Army weapon with the initials filed off.

Previously, Lieut. John J. Hanlon, of the Philadelphia Detective Bureau, who together with Chief County Detective Anthony Russo, obtained many of the written statements, and had identified the weapons used by the bandits.

The revolvers used by the accused included the 32 caliber, a 38-caliber and an 8-millimeter French trench revolver.

Trooper Keith Dane, of the Langhorne sub-station of State Police, and prosecutor in the case, yesterday identified 12 spent bullets that were found in the Feasterville Inn after the shooting, and one on a window sill in the home of Mrs. Elizabeth Hogeland, across the street from the inn. The bullet found in the Hogeland home is believed to be one of two fired by Zietz as he fled from the inn—one of which hit Kelly.

The Court's Ruling.

In admitting the signed statements of other holdups than those at Feasterville and Penndel—to which the defense attorneys, objected—Judge Boyer stated that the statements would be admitted only for the purpose of fixing a penalty in the case, if a verdict of guilty is found.

(Italics supplied).

RELATOR'S EXHIBIT NO. 75.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 4, 1948.

(Page 1).

Fate of Zietz and Foster in Jury's Hands

Killing During Robbery in First Degree Murder

Judge Boyer Informs Jury During His Charge This Morning—Father is Advised to Leave Courtroom and Does So, But an Aunt Remains —

The fate of two "trigger happy" Philadelphia youths, for whom the Commonwealth has asked the death penalty for the fatal shooting of a Trevoise man three days before Christmas last year, is now in the hands of a jury of four women and eight men.

Judge Calvin S. Boyer charged the jury this morning for two hours at the opening of the tenth day of the trial which probably will be completed with a verdict some time this afternoon.

District Attorney Edward G. Biester and his associate have asked that 23-year-old Harold Foster and 18-year-old

Relator's Exhibit No. 75

Harry Zietz pay with their lives for the brutal killing of William Kelly, 38, outside the Fegsterville Inn.

This morning, Judge Boyer very explicitly outlined the law regarding murder in Pennsylvania, explaining in detail the difference between murder in the first degree and murder in the second degree. The charge of the learned jurist was clear and to the point.

Father Left Room

Before Judge Boyer opened his charge to the jury, and upon the advice of his attorney, Henry Zietz, father of one of the co-defendants, was advised to leave the courtroom and he complied with the order. His wife, who was stricken ill in court, was ~~not~~ present this morning. Mrs. Ethel Foster, mother of the other defendant, was also absent from court this morning. An aunt of Zietz remained in the courtroom to hear Judge Boyer's charge.

"We have now come to the part of this long trial where you have an extremely important duty to perform," Judge Boyer commented in his opening remarks. "You have been performing numerous duties, of course, since this trial opened, but now it is up to you to make a decision. The manner in which you have listened attentively indicates the intelligence that you possess as jurors."

Judge Boyer pointed out that the duties of the jury in this case pertain only to the father of the co-defendants, Zietz and Foster, and nothing to do with two other defendants charged with the same crime (who will be tried later)—David Darcy, 22, and Felix Capone, 16.

In outlining the law, Judge Boyer particularly emphasized that the

RELATOR'S EXHIBIT NO. 76

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 4, 1948.

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Fate in Jury's Hands

(Continued From First Page)

Commonwealth in this case, contends that a murder was committed in the act of committing a robbery.

"That is murder in the first degree," Judge Boyer explained. "An unlawful killing in perpetration of a robbery, premeditated or not, is murder in the first degree."

Mother Stricken Ill

The grief-stricken mother of the defendant Zietz, collapsed in court Thursday afternoon just before her son's attorney, I. Louis Rybin, of Bristol, started his address to the jury. She is Mrs. Mae Zietz, 249 E. Baker st., Phila.

She was rushed to the Doylestown Emergency Hospital in an ambulance after Dr. Allen H. Moore was called to the courtroom. The extent of her illness has not been definitely determined, but she may have suffered a slight stroke from extreme shock and strain, Dr. Moore said.

Relator's Exhibit No. 76

A few minutes later, Mrs. Ethel Foster of 4032 Teasdale St., Phila., mother of the other defendant, also received medical aid from court attendants.

The two mothers and Zietz's father, have been in court throughout the testimony.

Mrs. Zietz was seated about 30 feet away from her son who was in prisoner's row, when she became ill. The accused Zietz jumped to his feet and tried to get to his mother's side, but was held back by State troopers.

Judge Boyer directed that the defendants be removed from the court room until the dramatics were over.

Asks Death Penalty

After that, Attorney Rubin summed up his case for his client Zietz. District Attorney Edward G. Biester had previously asked that the jury impose the death penalty with a first degree murder verdict.

Biester spoke first and was followed by Attorney Donald B. Smith for the defendant Foster, who was also represented by Attorney C. William Freed, Jr., of Quakertown. Their clients did not take the witness stand.

Attorney Rubin said in part: "It is true that Zietz and Foster were a *Jesse James* couple. The Commonwealth want to send these boys to their death. Zietz, I am certain is a victim of an unsettled age. I would certainly urge you that life imprisonment and not the death penalty would be proper in this case.

"The death penalty is a thing for hardened criminals.

"Can it be that the minds of these two boys are warped? They were not normal boys, with all the smart remarks they made on these hold-ups.

"If the State takes the lives of these boys what will be accomplished? They are not desperadoes; they are trigger-

happy kids, the victims of extreme juvenile delinquency and the times."

District Attorney Biester in his rebuttal remarks and the last speech to the jury before Judge Boyer's charge, answered the defense attorneys.

"It is true; this type of criminal don't shoot it out with the cops; they do their work against people who are unarmed", Biester said. "When arrested, they submitted to the police without a bit of argument. They were smart there; they knew that the cops had guns.

"Of course these boys are *not normal American boys*; no juror with common sense would believe that they are *abnormal boys*.

"But what is there in this entire case to warrant leniency?"

"Yes, they are a sorry lot today, but they were as brazen as they could be during this trial and during their escapades of crime. There is nothing in the opinion of the Commonwealth that would justify anything less than the supreme penalty, which the Commonwealth is asking."

Another Case Monday

Next Monday morning, the murder trial of Dave Darcy, 22-year-old Philadelphian, charged with the same offense, will get under way. He will be defended by Attorney Webster S. Achey, of Doylestown.

A verdict of first degree, with life imprisonment in the Zietz and Foster cases may mean that Darcy would plead guilty. The death penalty would mean that Darcy will put up a fight to beat the electric chair.

Judge Boyer's charge to the jury was completed at 11:30 o'clock this morning, and in his closing remarks, said in his opinion the death penalty is warranted in this case, but that it is up to the jury to decide.

(Italics supplied).

RELATOR'S EXHIBIT NO. 77.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 4, 1948.

(Page 3).

We Noticed

So great is the public interest in the Zietz-Foster murder trial that an extremely large number of spectators crowded into the court room yesterday.

That a local housewife, who hasn't missed a day of the murder trial in the Court House, here, was glad it rained over Memorial Day holiday weekend so she could get her washing, ironing, and other household chores performed.

(Italics supplied).

RELATOR'S EXHIBIT NO. 78.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 5, 1948.

(Page 1).

Two Young Killers Turn to Bible for Comfort

Doomed to death in the electric chair, 23-year-old Harold Foster, and 18-year-old Harry Zeitz, are spending most of their time reading the Bible and on their knees praying.

They were convicted yesterday by a Bucks County jury of four women and eight men, who wasted no time on their deliberation before returning a verdict of guilty of murder in the first degree with the death penalty recommended.

In their separate cells in the Bucks County Prison this morning the two killers were sad looking youths. Foster more so than Zeitz, is seeking consolation from the pages of the Bible. Foster has prayed almost constantly since he heard the lips of the jury foreman announce the verdict.

Zeitz was more concerned about his mother's condition than his ultimate fate. His mother collapsed in court several days ago and had to receive hospital treatment.

Foster ate very little yesterday, but Zeitz seemed to enjoy his meals, in spite of the fact that the bravado he displayed during the trial is cracking fast.

The two Philadelphians who were convicted of the murder of William Kelly, of Trevoise, last

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RELATOR'S EXHIBIT NO. 79.

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Turn to Bible for Comfort

(Continued from First Page)

December 22, have little chance of a new trial; it is believed, although their attorneys went through the routine motions which will prolong the fixing of the date for the death penalty.

Three special guards have been assigned to the two killers by Prison Warden Earl D. Handy. No chances are being taken for Foster, especially, is very despondent.

Ten days were required to try the two boys. Fifty-two witnesses, not counting police officers, were examined by the Commonwealth. The defense produced no witnesses. The amount of money paid out in costs to witnesses alone, not counting police, was \$628, and this does not include the expense of the jury, their board and pay.

DARCY'S TRIAL MONDAY

Next Monday morning, another jury panel will appear in court here when the murder trial of Davy Darcy, 22, will get under way. Darcy is charged also with the murder of William Kelly. His attorney will be Webster S. Achey, Doylestown.

(Italics supplied).

RELATOR'S EXHIBIT NO. 78.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 5, 1948.

(Page 1).

Held for Burglary

3 Youths Lived Near Zietz and Foster

Three Philadelphia youths living in the vicinity of an inn that was held up by the two convicted murderers, who were sentenced to death here, yesterday, was committed to the Bucks County Prison today on a charge of burglary.

They are Robert White, 18, of 8883 Bustleton Ave., George Johnston, 21, of 8390 Bustleton Ave., and Thomas K. Jones, 19, of 8917 Bustleton Ave.

They were arrested by Constable Isaac Watson, of Falls Township, charged with breaking into a house in that vicinity and stealing a radio. They were committed to the prison by Justice of the Peace Elwood Fritz, of Falls Township.

(Italics supplied).

RELATOR'S EXHIBIT NO. 78.

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(Page 1).

JUDGE BOYER PRAISES JURY FOR VERDICT CON-
DEMNING 2 KILLERS TO ELECTRIC CHAIR

Court Tells Eight Men and Four Women He Could Not See
How Any Other Course Could Have Been Taken—Two
Defendants Appear to Be Unmoved

With the jury's death knell still resounding in their ears when a verdict of guilty of murder in the first degree, with the death penalty, had just been brought in, Harry Zietz, 18, and Harold Foster, 23, yesterday heard Judge Calvin S. Boyer commend the eight men and four women for their excellent performance of their duties.

"I don't see how you could, under the evidence, have reached any other verdict," Judge Boyer said.

"Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the

seriousness of the folly in which so many young men indulge these days.

"The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision," Judge Boyer said.

Killers Unruffled

With the court room more than three-quarters filled and tension running high as it invariably does when a murder jury files in, the two defendants gave no indication of being upset. Both murderers wore their discharge emblems.

Harold Foster, dark and sharp-featured, stood up almost with a military bearing in order to hear the words, "Guilty with the death penalty" pronounced in his case first. He slumped noticeably into his chair, almost drooping, as the last of the 12 jurors repeated the terrifying phrase.

Harry Zietz, who looked each juror straight in the eye, glanced almost defiantly at Judge Boyer while the Court congratulated the jury.

State policemen who guarded the two defendants carefully while their fate was being decided and proclaimed in court, feel that the youths may have been prepared for the worst.

No comment was made by either youth, but reddish-haired Zietz almost towed Cpl. Harold F. Dando out of the large court room, so anxious was he to get out-of-doors and into the car which transported him back to prison.

An aunt and a brother of Foster sat silently and externally unmoved as they heard Foster convicted and doomed to the electric chair.

(Italics supplied).

RELATOR'S EXHIBIT NO. 79.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 5, 1948.

(Page 3).

Jury Acquits Him

Ferndale Man Cleared of Woman's Accusations

Deliberating about an hour, a jury before President Judge Hiram H. Keller yesterday afternoon acquitted a 53-year-old Ferndale carpenter and mason, Stephen Guttman, of rape, assault and battery with intent to ravish, fornication and assault and battery.

The verdict was returned only several minutes before the Foster-Zietz murder jury, which had been sitting through a nine-day trial, filed into the court room.

President Judge Keller, who discharged the jury, thanked the men and women for their services and commended them on their satisfactory verdicts.

The charges were preferred by a colored woman and the costs of prosecution were placed on the county.

(Italics supplied).

RELATOR'S EXHIBIT NO. 79.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 5, 1948.

(Page 3).

We Noticed

Woman who watches taxes and public expenses calling attention to the thousands of dollars it cost taxpayers to capture, try and convict just two of the trigger-happy bandits recently convicted and sentenced to the electric chair.

Police official quoted as saying that, if the killers of Kelly were not given the death sentence, the electric chair should be destroyed . . . and his opinion being agreed with by those who heard the statement.

(Italics supplied).

RELATOR'S EXHIBIT NO. 80.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 7, 1948.

(Page 1)

**Up To Late Hour This A. M. No Juror Had Been Gotten
for Darcy Murder Trial**

Black-haired Davy Darcy, 22-year-old Philadelphian, whose partners in crime, Harry Zeitz, 18, and Harold Foster, 23, were found guilty last Friday and sentenced to die in the electric chair, went on trial this morning in Judge Hiram H. Keller's court.

He is the third youth involved in the Feasterville Inn hold-up shooting and murder which took place last December.

Darcy is being defended by Attorney Webster S. Achey, of Doylestown, private counsel, and is being prosecuted by Assistant District Attorney Willard S. Curtin, with District Attorney Edward G. Biester associated.

The long ordeal of drawing a jury got under way at 10:15

this morning, with both Judge Keller and Judge Calvin S. Boyer, the trial judge last week, on the bench.

Attorney Achey's first objection this morning was overruled. Mr. Achey objected to the fact that the present panel was cut down to 81 jurors because 39 jurors had been previously excused. Mr. Achey argued that the excusing of that many jurors was prejudicial to the defendant.

Judge Keller informed the defense attorney that the excuses were for illness and other unavoidable things.

A fourth member of the "trigger-happy" gang, Felix Capone, 16, of Phila. is to be tried later.

The gang's victim was William

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RELATOR'S EXHIBIT NO. 81.

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No Juror Had Been Gotten

(Continued From First Page)

Kelly, who was mortally wounded while standing near the Feagterville Inn while the four were fleeing in Zietz's car the night of December 22. Another shot that night permanently crippled Alan (Reds) Hellerman, of Phila.

The first juror called for examination this morning was Mrs. Mabel Senderling, Perkasio, housewife, who was excused because of conscientious scruples against capital punishment.

From the start of the questioning of jurors this morning, it was evident that great difficulty will be met in selecting a jury.

Jurors informed the court that they had read a lot about the case and a number said that they had "formed a fixed opinion that could not be changed by the evidence".

All the jurors examined and challenged are being excused for the term.

Mrs. Anna E. Cole, of near Quakertown, a former New Yorker, whose husband is a chemical engineer employed in Lansdale, stated she does not object to death penalty, was challenged by the State peremptorily.

Eight jurors were called during the first hour and none accepted.

The sixteenth juror examined was accepted by both sides and he took the foreman's seat. He is William Dalton Pardoe, 64, Yardley, a Trenton rubber manufacturer.

(Italics supplied)

RELATOR'S EXHIBIT NO. 82.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 8, 1948.

(Page 1).

Darcy Murder Jury

- No. 1—William Dolton Pardoe, Yardley; a Trenton rubber manufacturer; foreman of jury.
- No. 2—Mrs. Anna W. Bucher, Newtown; housewife.
- No. 3—Marvin D. Weidner, Telford; Clerk.
- No. 4—Jesse H. Horne, Quakertown RD 3; farmer.
- No. 5—Oliver C. Landis, Perkasio RD; farmer.
- No. 6—Franklin T. Fretz, Perkasio; salesman.
- No. 7—Roger Mason, Perkasio RD 2; farmer.
- No. 8—Howard Price, Doylestown RD 2; farmer.
- No. 9—L. Calvin Fluck, Quakertown; hosiery knitter.
- No. 10—Mrs. Elva A. Shive, Dublin housewife.
- No. 11—Mrs. Ruth G. Bliss, Doylestown, housewife.
- No. 12—Mrs. Ann L. Reed, 28, Penn's Park, housewife.

RELATOR'S EXHIBIT NO. 82

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 8, 1948.

(Page 1).

**JUROR BEING QUESTIONED THROWS BOMBSHELL
IN COURT**

**Two Women Among 11 Accepted Up to 11 A. M. for the
Trial of Darcy on a Charge of Murder—An Extra Panel
of 30 May Be Summoned—Less Trouble than in
Trial of Zietz and Foster**

When a juror, called for examination the the Darcy murder case yesterday, was asked if he had read anything about the case in the newspapers, he paved his way for a quick exit, but got in his opinion.

"Yes I have read a lot," commented the juror in answer to a question asked by the defense attorneys, "and it's the coldest-blooded murder that I ever read about."

Objections came almost simultaneously from Attorneys

Webster S. Achey and William M. Power for the defense. Judge Hiram H. Keller, who is trying the case, also informed the juror that he was out of order.

Attorney Achey for the defense asked that the case be continued because of the juror's answer, but Judge Keller over-ruled the motion and granted an exception. The task of drawing a jury continued as the outspoken member of the panel was excused, without a count on the direct challenge list. *The several jurors already seated were advised by the court to disregard the juror's comment.*

Eight jurors were accepted up until adjournment last night as the trial of Dave Darcy, 22-year-old member of a four-team Philadelphia bandit gang that shot up the Feasterville Inn on the night of December 22, fatally wounded an innocent bystander outside the inn, and then held up the Deacon's Inn at Pennadel, the same evening.

Two co-partners in the crime, Harry Zietz, 18, and Harold Foster, 23, were convicted last week of first degree murder with the death penalty recommended.

Less trouble than the Zietz-Foster attorneys had two weeks ago in selecting a jury, is being experienced

(Please turn to page 6)

RELATOR'S EXHIBIT NO. 83.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 8, 1948.

(Page 6).

Juror Being Questioned .

(Continued from First Page)

by the counsel in the Darcy case. It is quite likely that the jury will be complete today and that testimony may get under way this afternoon.

One woman was accepted among the first eight jurors drawn. She is Mrs. Anna W. Bucher, of Newtown township, wife of Dr. R. L. Bucher, and the mother of five children. She is No. 2 juror. The foreman is a Trenton rubber manufacturer, William D. Pardoe, living in Yardley.

Mrs. Velma A. Rosenberger, wife of a Quakertown banker, said that she could discriminate as to the punishment in case of a first degree conviction in the Darcy case—either the death penalty or life imprisonment, but she drew a peremptory challenge from the defense. Harold Lake Bristol painter and father of six children, when asked whether he was physically able to stand the strain of what

might be a trial lasting a week or more, replied: "I guess I can. I have never had a doctor since I was born." But he, too, was challenged.

The jury challenging in the Darcy case is being conducted for the Commonwealth by Assistant District Attorney Willard Curtin, of Morrisville, but District Attorney Edward G. Biester, who prosecuted Zietz and Foster, is seated with Curtin.

There is a possibility, it was intimated yesterday that an effort will be made in the Darcy case, by defense attorney, to prevent the Commonwealth from presenting evidence in the trial about crimes committed by the defendant-other than the Feasterville Inn and Deacon's Inn shootings. During the trial of Dietz and Foster, the Commonwealth presented a large number of written statements in which the boy-bandit gang were hooked up with numerous holdups in various sections.

28 Jurors This A. M.

When court convened this morning there were 28 jurors left in the original panel from which to select the balance of the jury, four regulars and two alternates.

Challenged Yesterday

Among those challenged yesterday, either for cause or peremptorily, or excused by consent of counsel and court, were the following jurors: Alvin T. Albrecht, Telford RD; J. Harper Atkinson, Lahaska; John Barber, Bristol; Maude C. Buckman, Newtown; Walter S. Berger, Perkasio; Marguerite Berstresser, Perkasio; Charles A. Barndt, Perkasio;

Hugh P. Cassel, Telford; John J. Cole, Bristol; Erna M. Doane, Quakertown RD 1; Martin Frei, Haycock Run; John G. Ferguson, Andalusia; Miriam W. Flory, Sellersville; Emily O. Higgenbottom, Quakertown.

Joseph F. Hibbs, Morrisville; John E. Harrop, Morrisville; Ernest F. Hamm, Croydon; John R. Hansbury, Croydon; James G. Jackson Croydon; Russell F. Kleinman, Hartsville; Clifton Leedom, Neshaminy; Delbert Lynn, Bristol; Joseph E. Lownes, Newtown; Harold Lake, Bristol; Charles L. Miller, Doylestown; Nicholas Mislan, Morrisville.

R. Barclay Moon, Sellersville; Ethel G. Moyer, Sellersville; Elmer Ott, Hatfield RD; Francis M. Phillips, Ivyland; George R. Paxson, Langhorne; J. Alfred Rigby, Cornwells Heights; Frank Repetski, Bristol; Velma A. Rosenberger, Quakertown; Frank Sigley, Morrisville; Ira M. Swartz, Quakertown; Jacob Shive, Jr., Ottsville; Emma Shaddinger, Blooming Blen; Mabel Senderling, Perkasio; Wesley H. Talley, Forest Grove; Harry T. Westlake, Sellersville; Doris C. Wilson, Point Pleasant; Harry W. Wambold, Sellersville RD 1; Stanley R. McKnight, Perkasio RD1; and Alleine C. Gardiner, Sellersville RD 1.

Approves Death Penalty

Mrs. Warren Elville, Of Doylestown, when called as a juror for examination, said she had formed an opinion and does not object to capitol punishment. Her husband is a painter. The defense challenged for cause.

Two More Selected

Only two jurors were accepted during the first two hours this morning. One is L. Calvin Fluck, Quakertown hosiery

knitter, who was seated as No. 9 juror. The other is Mrs. Elva A. Shive, Dublin housewife.

There were 15 jurors remaining when court recessed for 20 minutes at 11 A. M.

Also Challenged

Challenged this morning were the following jurors: Robert W. Hall, Cornwells Heights; Clarence G. Angeny, Danboro builder; William S.V. Rodgers of Ivyland; Harold L. Loud, Bristol; Norman S. Penrose, Doylestown; Mrs. Lovada E. Schlichter, Trumbouersville; Samuel J. Illick, Hulmeville; Leonard Miller, Croydon R.D. 1; William H. Slaughter, Doylestown; Mrs. Ilse Mulligan, Upper Black Eddy; Mrs. Elizabeth G. Elville, Doylestown.

Mrs. Ruth G. Bliss, 60, Doylestown, whose husband, Albert Bliss, was challenged last week as an extra venireman in the Foster-Zietz case, was passed by the Commonwealth and accepted by the defense, and was seated as Number 11 juror shortly before noon today.

If necessary, an extra venire will be selected when court convenes this afternoon.

(Italics supplied)

RELATOR'S EXHIBIT NO. 84.

DOYLESTOWN DAILY INTELLIGENCER.

JUNE 8, 1948.

(Page 2).

GUEST EDITORIAL

Two Murder Convictions

Phila. Eve. Bulletin.

Cries of "*maudlin sympathy*" from the public were heard last Fall when a youth accused of killing two policemen escaped the electric chair. He did get a life sentence. *Several women were on the jury, and were blamed for failure to recommend death.*

No such cries are being heard as the result of two murder verdicts over this weekend. In Doylestown two youths were sentenced by a jury to be executed for murdering a man after a hold-up in Feasterville. In Philadelphia another jury, which had nine women among its members, voted a similar penalty in convicting the slayer of a policeman. Four women were on the jury in Doylestown.

These verdicts are a vindication of women as jurors, and afford convincing evidence that opinion on use of the death penalty is not determined solely by sex.

Members of these juries deserved the commendation they received from the trial judges.

(Italics supplied)

RELATOR'S EXHIBIT NO. 85.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 9, 1948.

(Page 1).

Darcy Murder Jury

- No. 1—William D. Párdoe, Yardley; rubber manufacturer and foreman of jury.
- No. 2—Mrs. Anna W. Bucher, Newtown; housewife
- No. 3—Marvin D. Weidner, Telford; clerk.
- No. 4—Jess H. Horne, Quakertown RD 3; farmer.
- No. 5—Oliver C. Landis, Perkasio RD; farmer.
- No. 6—Franklin T. Fretz, Perkasio; salesman.
- No. 7—Roger Mason, Perkasio RD 2; farmer
- No. 8—Howard Price, Doylestown RD 2; farmer.
- No. 9—L. Calvin Fluck, Quakertown; hosiery knitter.
- No. 10—Mrs. Elva A. Shive, Dublin; housewife.
- No. 11—Mrs. Ruth G. Bliss, Doylestown; housewife.
- No. 12—Mrs. Ann L. Reed, Penn's Park; housewife.

Alternate Jurors

- No. 1—William F. Hickey, 45, Morrisville; telephone construction superintendent.
- No. 2—Mrs. Virginia Brillman, Point Pleasant; housewife

RELATOR'S EXHIBIT NO. 85.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 9, 1948.

(Page 1).

Trial of Darcy on Murder Charge Continued this A. M.

**Court Over-rules Defense Objection to Taking Jurors to
Scene of the Murder—Last Man in the Original Panel
of 81 Completed the Jury—No Special
Panel was Needed.**

The Commonwealth opened its case this morning in the trial of Dave Darcy, 22-year-old Philadelphian, charged with the part he took in the murder of William Kelly, of Trevoze, outside the Feasterville Inn on December 22, last year.

District Attorney Edward G. Biester, whose prosecution gave the Commonwealth a double conviction last week against two co-partners of Darcy—and the death penalty—opened to the jury this morning after court had convened at 10 o'clock. He told the jury that he would have more to say regarding the penalty later on in the trial. He made

no mention of the death penalty in his opening to the jury. Mr. Biester last week in the trial of Harry Zietz, 18, and Harold Foster, 23, asked for the death penalty when he made a summation to the jury.

The bullet-riddled interior of the Feasterville Inn was visited yesterday afternoon by the jurors, President Judge Hiram H. Keller and a few court officers, who viewed the rooms where the holdup took place two nights before Christmas and the locale where the fatal shot was fired outside the inn, by Zietz.

The jury, completed yesterday afternoon, is composed of four women and eight men—plus two alternates, a man and a woman. The alternates selected yesterday are William F. Hickey, 45, of Morrisville a New Jersey Bell Telephone construction superintendent; and Mrs. Virginia Brillman, Point Pleasant housewife and youngest member of the jury.

The entire panel of 81 jurors was used in picking the the venire that will decide Darcy's fate. Jurors were examined for the Commonwealth by Assistant District Attorney Willard S. Curtin, and District Attorney Biester; and for the defense by attorneys Webster S. Achey and William M. Power.

The Commonwealth contends that although the actual shot that finally caused the death of William Kelly was fired by Zietz, that the three others who participated in the Feasterville holdup are equally guilty of murder since the fatal

(Please turn to Page 8)

RELATOR'S EXHIBIT NO. 86.

DOYLESTOWN DAILY INTELLIGENCER.
JUNE 9, 1948.

(Page 8).

Darcy Murder Trial

(Continued From First Page)

shooting took place immediately following robbery.

The fourth member of the young quartet of bandits is Felix Capone, 16, who cannot read or write, and who will be tried later.

Darcy's parents were in court yesterday. His father was recently promoted to be assistant crier in the Philadelphia courts. Other friends of Darcy were also present yesterday as the jury was being selected.

Ask New Trial

During the operation of yesterday's proceedings, formal application was filed for a new trial for the convicted Zietz and Foster. The official papers contained the reasons for

a new trial application. Zietz's petition was filed by Attorney I. Louis Rubin, of Bristol, while Foster's petition was filed by Attorney Donald Smith, of Perkasio.

Opposed By Defense

District Attorney Biester's motion to have the jury taken to the scene of the crime, was objected to by Defense Attorney Achey on the grounds that it would be prejudicial to the defendant. The objection was over-ruled by Judge Keller and an exception granted.

The fact that the last juror needed was selected from the final number of the panel of 81, made it unnecessary for Sheriff H. Raymond Ahlum to carry out the orders of the court that had been prepared in advance, for a special venire of 30 jurors. *The jury was completed at 1:50 p.m. Tuesday and sworn in five minutes later.*

Among the jurors who were challenged for various reasons, just before recess yesterday noon, and just before the panel was completed, were the following:

Mrs. Eva F. Kinsey, Telford RD 1; Mary E. Singley, Upper Black Eddy; Edmund C. Anderson, Langhorne RD 2; Mrs. Emily V. Maddux, Pipersville, housewife; Carlton A. Palmer, Morrisville, dairyman; Noah M. Rice, Perkasio R.D. 2 farmer; Mrs. Virginia Mann, Perkasio; Robert H. Clarendon, Buckingham township; Mrs. Rachel L. Fox, Quakertown R.D. 2; Dudley E. Bell, Bristol; George H. Kerns, Colmar.

The First Witness

The Feasterville Inn's physical layout was described in plans made by William S. Erwin, the first witness called this morning.

Inn's Owner Testifies

John R. Naysmith, proprietor of the Feasterville Inn, identified a group of photographs taken at the scene of the crime.

Naysmith testified that 18 patrons were in his place on the night of the holdup on Dec. 22. He described the holdup as he saw it.

"Foster was in front of the cash register with a gun pointed at me", Naysmith testified. "He said: 'This is a stickup'. I heard two shots, and some scuffling, and then heard more shots. Foster fired twice toward the entrance door.

"I turned around and saw Darcy with a gun in his hand pointing toward the people who were lined up against the wall. And I saw a man, Alan Hellerman, lying on the floor.

"Darcy walked over from the juke box and said: 'Where's the hero that hit me,' and then he said 'Why don't somebody take this gun off me? I feel like shooting somebody else. Where's the police?' Then he said, 'how about the watches.' The money had been taken out of the wallets of the patrons by Foster.

"Darcy took some watches, and to one patron he commented: 'You shouldn't throw the watch at me, pop; you should hand it to me.'"

(Italics supplied).

RELATOR'S EXHIBIT NO. 90

DOYLESTOWN DAILY INTELLIGENCER

JUNE 10, 1948.

(Page 2):

(Editorial).

VERDICTS HIGHLY PRAISED

NEWSPAPERS and individual citizens have in the past week highly praised the jurors who returned a verdict calling for capital punishment for three convicted killers. And on those juries were women in each instance.

The Almeida verdict in Philadelphia and the conviction of Zietz and Foster for murder in this county have been universally lauded.

This endorsement of the extreme punishment for callous killers indicates very definitely that the public has become disgusted with the pampering of vicious criminals, although that was clear earlier.

Earlier the jury which convicted a Philadelphia murderer in the first degree . . . but only designated life imprisonment . . . was subjected to a storm of denunciation by a great many persons.

Imposition of capital punishment may not end all murders, but it does intimidate a great many potential killers.

(Italics supplied)

RELATOR'S EXHIBIT NO. 94.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 12, 1948.

(Page 1).

**Judge Boyer Warns that Bucks County is Tired of
Thieves from Phila.**

**Court Warns Youth that County Intends to Do Something
About It—Asks Defendant Whether He Wants to Get
Into Position of Killers who Were Sentenced to
Electric Chair**

Asserting that "We don't propose to nail all our property fast here in Bucks county just because thieves from Philadelphia want to pick up everything, which isn't being watched," Judge Calvin S. Boyer, who sentenced an 18-year-old youth to prison yesterday, asked, "What business did you have to come up here in the first place?"

Lecturing Robert White, 18, 8388-Bustleton avenue, Phila. who pleaded guilty to stealing a car-radio out of a car belonging to Henry Bellardo, Fallsington, Judge Boyer said:

Relator's Exhibit No. 94

"So far as your testimony is concerned, you have not shown any excuse at all to come out of Philadelphia to Bucks County."

Upbraiding the youth, who is one of a trio charged with larceny and receiving stolen goods, Judge Boyer asked him:

"Have you heard what's going on down stairs?"

The youth answered meekly, "Yes".

"Do you want to wind up like that?" referring to the two hold-up murderers who were recently doomed to the electric chair.

"I'd like to have another chance", said the youth, whose mother described him as a "good boy".

"We in Bucks county are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it", Judge Boyer said.

The youth pleaded guilty to stealing a car radio which they thought was junk. George Johnson, 8390 Bustleton avenue, and Thomas L. Jones, 8917 Bustleton avenue, who were arrested with White on May 23, will stand trial later on.

The youth was sentenced to pay the costs of prosecution, serve

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RELATOR'S EXHIBIT NO. 95.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 12, 1948.

(Page 6).

Judge Boyer Warns Thieves

(Continued From First Page)

not less than four months nor more than 12 in the County Prison.

"I do not want White to associate with the other two defendants while in prison", Judge Boyer said to Sheriff H. Raymond Ahlum. "Unless you get an entirely different idea or conception of what belongs to you and respect for other people's property, you will have a sorry life", Judge Boyer warned the youth.

* / * *

(Italics supplied)

RELATOR'S EXHIBIT NO. 94

DOYLESTOWN DAILY INTELLIGENCER
JUNE 12, 1948.

(Page 1).

Darcy Friend is Arrested

Hurrying to the trial of his friend *David Darcy*, who is on trial for murder in the Bucks county court house at the present time, Charles M. Edward, 21, of 3024 Longshore ave., Phila., was arrested yesterday on charges of failing to stop at the scene of an accident, failing to identify himself, and reckless driving.

* * *

(Please turn to Page 5)

1098a

Relator's Exhibit No. 96

RELATOR'S EXHIBIT NO. 96.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 12, 1948.

(Page 5).

Darcy Friend is Arrested

(Continued From First Page)

* * *

At the State Police sub-station, Edward at first denied the hit-run charge, but later signed a statement of confession. He told police that he was a friend of Darcy's and was hurrying to Doylestown to attend the court session.

* * *

(Italics supplied)

Relator's Exhibit No. 101

1099a

RELATOR'S EXHIBIT NO. 101.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 15, 1948.

(Page 1).

**Darcy Guilty of Murder, With the Death Penalty
Recommended**

"Expected It" Killer Told an Officer After Verdict

**Three Death Penalties Imposed Within Two Weeks on
Members of the Mob that Held Up and Shot Up Feaster-
ville Inn, During Which One Man Was Killed,
Another Crippled for Life and a Third Shot**

Bucks county justice made it "three in a row" yesterday as David Darcy, 22-year-old member of a ruthless bandit mob, was convicted of murder in the first degree with the penalty set as death.

He was the third member of the gang of four charged

with the murder of William Kelly, 38, of Trerose, who was doomed to death in the electric chair, during the past two weeks. His co-partners are Harry Zietz, 18, and Harold Foster, 23. The fourth and youngest member of the gang is Felix Capone, 16, who will be tried later. Kelly, an innocent bystander, was shot outside the Feasterville Inn.

A jury of five women and seven men deliberated a trifle less than two hours yesterday afternoon after President Judge Hiram H. Keller had charged them as to the law.

It was 4:40 p. m., when the verdict of guilty was announced by the foreman of the jury, William D. Pardoe, of Yardley. Defense Attorney Webster S. Achey, who earlier in the day had asked the jury to find his client guilty of first degree murder with life imprisonment, then requested that the jurors be polled separately, and this was done.

Unanimous From the Start

The death penalty, it was said by a member of the jury after the case, was the unanimous choice of all jurors from the start of deliberation.

Darcy took it like a stoic. According to police who have been

(Continued on Page 5)

RELATOR'S EXHIBIT NO. 102.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 15, 1948.

(Page 5).

Darcy Guilty of Murder

(Continued From First Page)

guarding him on his trips back and forth to the court house from the Bucks County Prison, he sensed the verdict several days ago.

Darcy Expected It

"How long were they out?" Darcy asked a State trooper as he was being returned to the court room yesterday afternoon to hear the verdict. He was informed "about two hours".

After the verdict, his only comment was, "I expected it."

Slipped Him Lucky Piece

As Darcy was being led to his cell in the County Prison yesterday afternoon, he passed the cell of his partners, Zietz and Foster. Foster quickly slipped a small object to Darcy, but the eye of a watchful guard saw the move. The object was a small good luck trinket.

Darcy stood at attention between State troopers and a

deputy sheriff as Clerk of Quarter Sessions Matthew Godshall polled the jurors individually. Not once did he move.

Nearby were Darcy's father, other members of the family including a brother, and his girl friend, who have been in court most of the trial which started a week ago yesterday. They bowed their heads as the last juror replied "guilty".

The case was placed in the jury's hands at 2:40 p. m., following Judge Keller's charge. Observing attorneys offered the opinion that the jurist's charge was "most fair" to the defendant.

Jurors who served on the case were discharged with the thanks of the court. They had been "in the custody of court officers" for nine days.

As the large crowd left the court house, where many had gathered to hear the verdict, there was wide-spread comment heard from men and women who seemed to unanimously approve of the verdict and the efficient manner in which the Commonwealth had prepared its case. They seemed to "pity the parents; not the defendants" in this case.

Cost to Taxpayers

Several persons acquainted with court costs estimated yesterday that if the four members of the Philadelphia bandit-gang had received life imprisonment, instead of the death penalty, it would have cost the taxpayers close to \$200,000, if they were to live until they were 65.

An estimate was made yesterday that before the trials are completed, and with a death penalty in each case, the costs will amount to approximately \$25,000.

The conviction of three for murder, with the death penalty recommended—within a period of three weeks—is also somewhat of a record for Bucks county.

(Italics supplied)

RELATOR'S EXHIBIT NO. 105.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 17, 1948.

(Page 2).

(Editorial).

RAUS MIT'EM

JUDGE CALVIN S. Boyer's warning to tough crooks from Philadelphia and other places to keep out of Bucks county or take the consequences . . . should be impressive because recent juries of men and women convicted three trigger happy young holdup men involved in the killing of a respected resident of Feasterville, without provocation, and recommended their execution in the electric chair.

The warning has been given before, but not under such impressive circumstances.

At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to the vicious lawlessness of a great many young crooks who have operated in the county.

Conviction of even murderers in the first degree with the death sentence have not been numerous in recent years . . .

which should convince potential bandits and killers that leniency on the part of jurors is not likely to be easy to get.

For a long time jurors or the court have made it clear that they wanted to give the young offenders every chance to show that they would reform . . . but the evidence appears to unmistakably indicate that Bucks countians have concluded that leniency has merely been taken as an indication of weakness. The conviction of the three young men for a wanton and unprovoked murder . . . and the imposition of the death sentence . . . together with Judge Boyer's warning . . . it is to be hoped will cause bandits and killers to steer clear of the county.

Getting tough has worked that way in other instances.

(Italics supplied)

RELATOR'S EXHIBIT NO. 106.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 19, 1948.

(Page 2).

The Gossiper

YOU OFTEN hear some one say: "They would steal any-
thing that wasn't nailed down."

Well, the other day Judge Calvin S. Boyer, in the local court, while addressing a Philadelphia youth convicted of theft . . . said that Bucks countians are not going to be forced to nail down everything they own in order to prevent Philadelphia crooks from stealing them.

"Believe me, judging from what a County Seat resident told me the other day . . . nailing things down would not provide much protection.

The story told me was that some thief or thieves had stolen a valuable ornamental iron fence from around a property almost in the heart of our "fair city".

* * *

(Italics supplied).

RELATOR'S EXHIBIT NO. 107.

NEWTOWN ENTERPRISE,
JANUARY 1, 1948.

• (Page 1).

Easy Xmas Money Was BANDITS Aim

**Four Young Men Caught After Two Hold Ups and
Three Shootings**

Four Philadelphia bandits who shot up two taprooms in lower Bucks county late Monday night, December 20, fatally wounding one man and injuring two others, today are to face murder charges.

District Attorney Edward Biester, of Bucks county, said that Philadelphia authorities will be asked to turn them over to him for prosecution following the death of William Kelly, 38, of Treyose, in Abington Hospital, Wednesday night.

A few hours after four young men stuck up the Feasterville Taproom about midnight Monday, Philadelphia police

captured them in Philadelphia. The arrest was an important one since the youths under questioning admitted a long list of hold-ups with violence. At Feasterville three men were shot. All are expected to recover.

Those arrested are: Harold Foster, 23; David Darcy, 22; Harry Zeitz, 18; and Felix Capone, 16; all of Philadelphia. Their admitted depredation included the recent hold up at Bell's Corner, Bustleton, and others in Montgomery County and in New Jersey.

Two patrolmen arrested the men in an automobile at Frankford avenue and Friendship street, Philadelphia, and said they answered the description of the bandits.

The gunmen shot Edward Wunsch, 25, and Allen Hellerman, both of Feasterville, patrons of the Feasterville Cafe on Bustleton pike.

They took a total of \$195 from 15 patrons and the cash register. Upon leaving, the bandits fired again, wounding William Kelly of Trevese in the head.

Kelly was taken to Abington Hospital, while State Police took Wunsch to Nazareth Hospital and Bucks County Rescue Squad took Hellerman to Nazareth Hospital.

Hellerman, with a bullet in the neck, was later removed to Temple University Hospital, Philadelphia. Wunsch received wounds in the right arm and shoulder.

While a widespread police hunt got under way, the bandits entered Deacon's Inn near Pennel, taking \$140 from 12 male customers and \$100 from the proprietor, Fred Lachenman.

The story of the hold-up at Feasterville Tavern as told by the proprietor, John Naysmith, nephew of James Brown, former owner, is as follows:

(Continued on Page Three)

RELATOR'S EXHIBIT NO. 108.

NEWTOWN ENTERPRISE,
JANUARY 1, 1948.

(Page 3).

BANDITS Aim

—Continued from Page One—

"I was back of the bar at 11:30. There were about 18 customers in the place, some of them playing suffleboard in the rear room. Three young men, about 22 years old, all white and unmasked, came into the place, brandishing guns. One of them leaped over the bar yelling 'This is a stick-up'. One of the *bandits* went to the back room and the group there started to wrestle with him. The *bandit* finally brought those from the rear room to the main tap room. A woman from Fox Chase ran out of the place and over to the Buck Hotel across the street to get help.

"One of the *bandits* then fired his gun and shot Ed Wunsch. Wunsch's father-in-law got Wunsch out the back door in some manner while the *bandits* were still there. Hellerman had also been shot and was lying on the floor in the bar room. The *bandits* then emptied the cash register

of about \$68 or \$70. They made everybody put their wallets on the bar, and the *bandits* emptied them. Then the *bandits* took the patrons' wristwatches. I think they got about five in all. I don't know how much money they got from the patrons' wallets. My wife was in the kitchen and they brought her out with the crowd." Naysmith and his wife, and James Brown reside at the taproom.

Continuing Naysmith said: "The *bandits* then shot out the telephone and went to the door. One called to us "Keep quiet for quite a while." They shut the door, but in a few seconds, one *bandit* opened it again and sticking his head in and waving his gun called out 'Don't move, Merry Christmas, One man, "Bill" Kelly, was shot in front of the Buck Hotel as the *bandits* left. Kelly was standing there with a couple of other men, and I think the *bandits* shot when they heard the group there. I don't believe Kelly and his friends knew what was going on across the way."

Naysmith says the trio made their get-away in a 1939 Plymouth sedan.

Fred W. Valeria, proprietor of *Deacon's Inn, Lincoln Highway, Penn del*, the second place visited by the *bandits*, said the robbery at his place occurred at 12:15 A. M. At the time there were four men in the place and they were playing shuffleboard.

"My wife and I were at the bar when three men entered. They ordered drinks, but I noticed one of them was rather young so I refused to serve him. The men sat at the bar sipping their drinks for a while, when one of the men got off his stool and appeared to be headed for the juke box", said Mr. Valeria.

Mrs. Valeria, who was standing outside the bar, saw him reach in his pocket, pull out a gun, and go under the bar. He pointed the gun at her husband and said "This is a stick-up. Get in front of the bar and rest your hands there."

Simultaneous with this, the other two men pulled out guns and covered the four customers who were playing shuffleboard. They ordered them to empty their pockets and one of the *gun-wielding men* said "Hurry up. We just shot two men a little while ago for being so slow". They took jewelry and wallets from the men.

As this was going on the man behind the bar emptied the register, and got between \$35 and \$40 in cash, and, not satisfied with what he got from there, demanded more.

Mr. Valeria told him there was no more money, so the man behind the bar came out in front of it and started for the kitchen to see if he could find any more loot. Mrs. Valeria pleaded with him not to go in there as her grandchildren were sleeping there. He decided not to.

After satisfying themselves they had stolen all available, one man stood at the bar, another sat by the door, and a third went to the piano and began playing "boogie-woogie". As this was going on a fourth man entered. He was also armed.

Suddenly they decided to leave. Three of the men went to a car and started it, the fourth man remained and pulled the phone connection out. As he was leaving he turned and fired a quick shot over the heads of Mr. and Mrs. Valeria saying, "You'd better not follow us now."

(Italics supplied)

RELATOR'S EXHIBIT NO. 109.

NEWTOWN ENTERPRISE.

JUNE 3, 1948.

(Page i).

Youths Escapade Ends in Murder

**Two of Four Now on Trial for Feasterville Shooting,
December 22**

The sordid tale of thrill seeking youths whose escapade ended in murder is in its second week in criminal court at Doylestown. Two of the four who wantonly shot up the Feasterville Inn during last Christmas week are on trial.

Witnesses have testified in the murder trial of Harold Foster, 23, and Harry Zeitz, 18, both of Philadelphia, of the hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later.

One of the leading Commonwealth witnesses Eddie Wuensch, 26-year-old Feasterville sheet metal worker, said he was in the shuffleboard room at the tavern, when David

Darcy, one of the bandits yet to be tried, came in and fired two shots.

"I was scuffling with Darcy and all of a sudden I felt something hot in my right arm and left shoulder", Wuensch testified. "Lots of shots were being fired. I was later taken to the hospital.

"They left me come home for Christmas, but I had to go back to the hospital for an operation after Christmas; but the operation was not successful in removing one of the slugs in my shoulder.

"Before I was shot I saw neither Zietz nor Foster—they were in the adjoining barroom."

The witness Wuensch testified

(Continued on Page Two)

RELATOR'S EXHIBIT NO. 110.

NEWTOWN ENTERPRISE,
JUNE 3, 1948.

(Page 2).

Murder Trial

Continued from Page One.

that after an operation on his back he had to take a six weeks' rest, and that pains in his back constantly prevent him from doing the type of work he has been doing.

Another witness was Howard Polmateer, of Holland, a patron the night of the hold-up, who described what he saw.

The defense attorneys asked no question of the witnesses Wuensch and Polmateer.

Frank Fronsedale, 45, of Feasterville, a painter, testified he was in the tavern with George Roth and saw Zeitz and Foster at the bar.

"I saw Foster jump over the bar, pull a gun and declare it was a stickup—he had a gun in his hand and he swung it toward the bartender."

"I heard two shots from the shuffleboard room. Then a fist fight started, and more shooting started. I saw Darcy

shoot Eddie Wuensch. Zietz, too shot at Wuensch. Zietz fired 2 shots that I saw. Other shots were fired from the back of the bar.

"I saw *Darcy* fire two shots into the telephone mouthpiece, and heard one of the three holdup men say he wished some cops would come in so he could shoot them up."

James Brown, 67, of Feasterville, owner of the building where the holdup occurred, and an uncle of John R. Naysmith, the proprietor, testified that he "put his hands up, the same as the others did," after he had served a beer to Foster.

"Foster pointed a gun at me as well as the rest of the people," Brown testified. "Hellerman and *Darcy* were scuffling in the bar. I saw Foster take deliberate aim and fire 2 shots in direction of Hellerman and *Darcy*."

"I saw at least 3 shots fired by Zietz's gun in the same direction, and I saw Hellerman fall, Edward Wunsch was also in the scuffle. Zietz shot 3 times in succession before Foster fired."

Brown testified that he saw Kelly' lying on the ground outside the tavern after the holdup.

Mrs. Gertrude Raistrick, 43, of Feasterville, testified that she and her husband were in the tavern looking at televised fights on the night of December 22, 1947, between 10 and 11 P. M. Virginia Stickel also accompanied the Raistricks.

"I saw Zietz shoot Eddie Wunsch and I saw *Darcy* fire shots too," the witness said. "When Foster fired, I had to dodge or I'd have gotten it", Mrs. Raistricks added.

"Zietz fired first", Mrs. Raistrick continued. "Then Foster fired two shots that I saw, and Hellerman fell and I fell too. I saw *Darcy* reload his gun in front of me."

Mrs. Raistricks said that Foster looked at her wedding ring and said, "Oh, you're married, we don't want her ring."

Harrison Raistrick, 53, husband of the previous witness.

Relator's Exhibit No. 110

corroborated his wife's testimony. He said he saw Zietz fire directly at Eddie Wunsch.

"I can account for about 10 shots fired inside the tavern," Harrison Raistrick testified. "I put \$8.03 on the bar. Foster was taking money out of the wallets, putting it in his pocket. Zietz was at the door with a gun covering the patrons.

"Zietz picked up Hellerman's hat and put it on his head, and said, 'You won't need that where you're going.' Hellerman had been shot and was lying on the floor, in a bleeding condition.

"I knew the victim Kelly for about 16 years. I saw him laid out at the funeral parlor".

Frank Walter Testifies

Frank Walter, 29, of Feasterville, a friend of the victim Kelly, stated that he saw Kelly at 11 P. M. at the Buck Hotel on the night of the holdup, and was talking to him for some time.

"About 11:25, Mrs. Lewtwyler rushed into the hotel and said there was a shooting at the Feasterville Inn", Walter testified. "She was hysterical and ran.

"Kelly and I went down the road and were standing at an intersection near the Feasterville Inn, talking about the reported holdup. Right then we were not certain about there being a holdup.

"There were no street lights around us, but we saw two men run out from the inn. Horace Patterson, a friend of mine, was standing with Kelly and I.

"There was an automobile parked in front of the Feasterville Inn, with the front grille of the car pushed in.

"One of the men got in behind the driver's seat of the

car and the other man got in the other side, in front. The car remained there a minute and the lights were turned on and off, only one light worked. The motor of the car was running.

Describes Shooting

"Then the car started up the Newtown road. As the car passed us, I noticed two sharp flashes from the driver's window, two orange-like flashes, and a noise like a revolver shot.

"Kelly fell to the ground.

"We were not over 10 to 20 feet away from the car when the shots were fired. Kelly was bleeding from the back of his head. Patterson ran to get help and the bandit car continued on.

"Kelly was not conscious after he fell, but he did regain consciousness a few minutes later and said: "Who were they? Why did they shoot me? Look! I'm paralyzed."

"Then we took Kelly to the Abington Memorial Hospital. I next saw Kelly in the hospital on Christmas Day. And he was dead."

(Italics supplied)

Relator's *Exhibit* No. 115(C)

RELATOR'S EXHIBIT NO. 115(c).

CRIMINAL MINUTES,
BUCKS COUNTY,
1948.

(Page 9).

MAY TERM A.D. 1948

1948 JUNE 7—COURT CALLED AT 10 O'CLOCK A.M.
HON. HIRAM H. KELLER, P.J. AND
HON. CALVIN S. BOYER, J. PRESID-
ING.

EO DIE—COURT RECESSED 12:02 UNTIL 1:30
O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 5:33
O'CLOCK P.M. UNTIL TUESDAY,
JUNE 8, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 8—COURT CALLED AT 9:30 O'CLOCK
A.M. HON. HIRAM H. KELLER, P.J.
AND HON. CALVIN S. BOYER, J.
PRESIDING.

Relator's Exhibit No. 115(C)

EO DIE—COURT RECESSED AT 12:10 UNTIL
1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 3:55
O'CLOCK P.M. UNTIL WEDNESDAY,
JUNE 9, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 9—COURT CALLED AT 10 O'CLOCK A.M.
HON. HIRAM H. KELLER, P.J. AND
HON. CALVIN S. BOYER, J. PRESID-
ING.

EO DIE—COURT RECESSED AT 12:05 UNTIL
1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 5:05
O'CLOCK P.M. UNTIL THURSDAY,
JUNE 10, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 10—COURT CALLED AT 10 O'CLOCK A.M.
HON. HIRAM H. KELLER, P.J. AND
HON. CALVIN S. BOYER, J. PRESID-
ING.

EO DIE—COURT RECESSED AT 12:00 UNTIL
1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 3:55
O'CLOCK P.M. UNTIL FRIDAY, JUNE
11, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 11—COURT CALLED AT 10 O'CLOCK A.M.
HON. HIRAM H. KELLER, P.J. AND
HON. CALVIN S. BOYER, J. PRESID-
ING.

EO DIE—COURT RECESSED AT 12:00 UNTIL
1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 9:30
O'CLOCK P.M. UNTIL SATURDAY,
JUNE 12, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 12—COURT CALLED AT 10 O'CLOCK A.M.
HON. HIRAM H. KELLER, P.J. AND

Relator's Exhibit No. 115(C)

HON. CALVIN S. BOYER, J. PRESID-
ING.

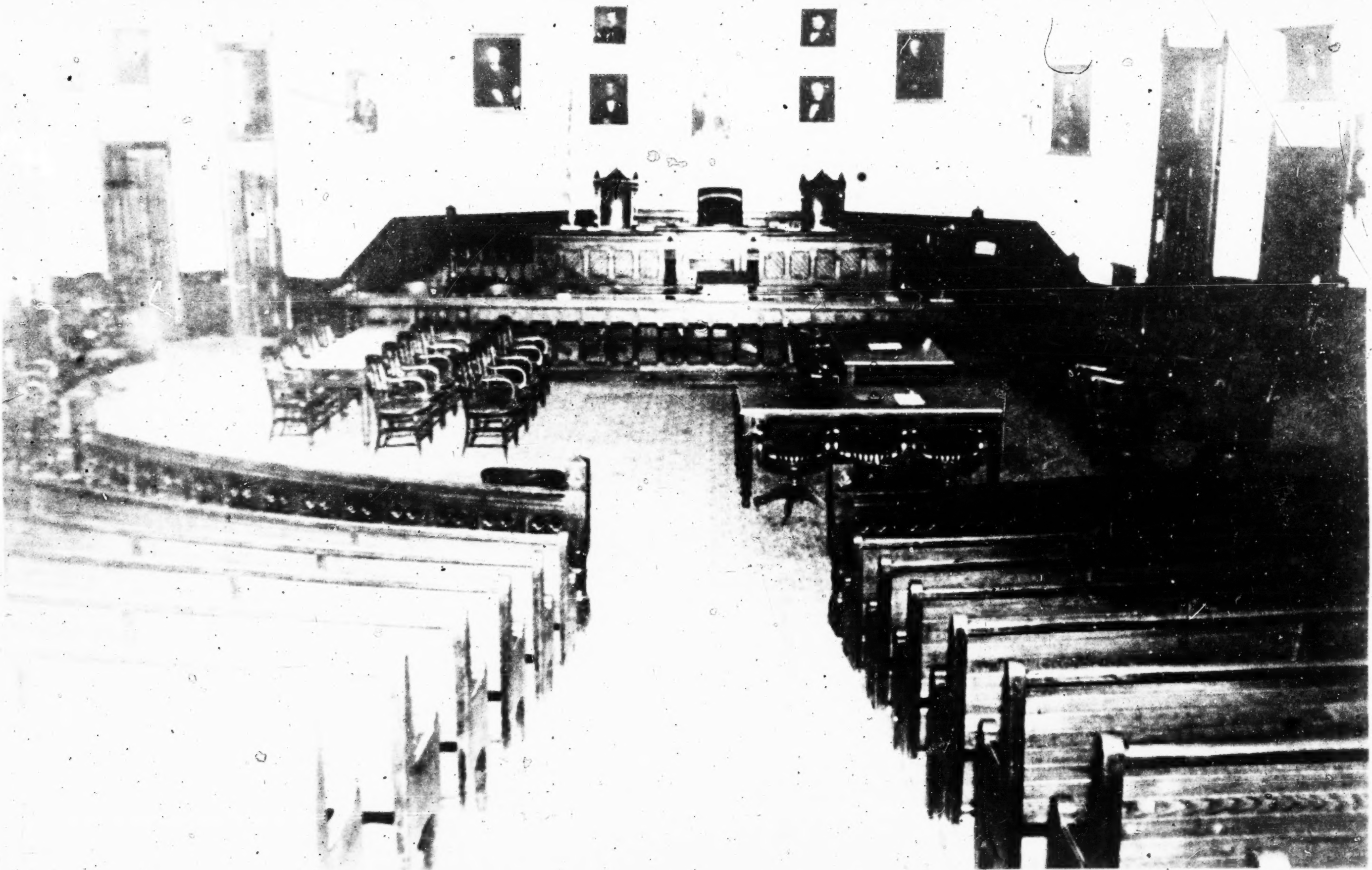
EO DIE—COURT ADJOURNED AT 11:13
O'CLOCK A.M. UNTIL MONDAY,
JUNE 14, 1948 AT 10 O'CLOCK A.M.

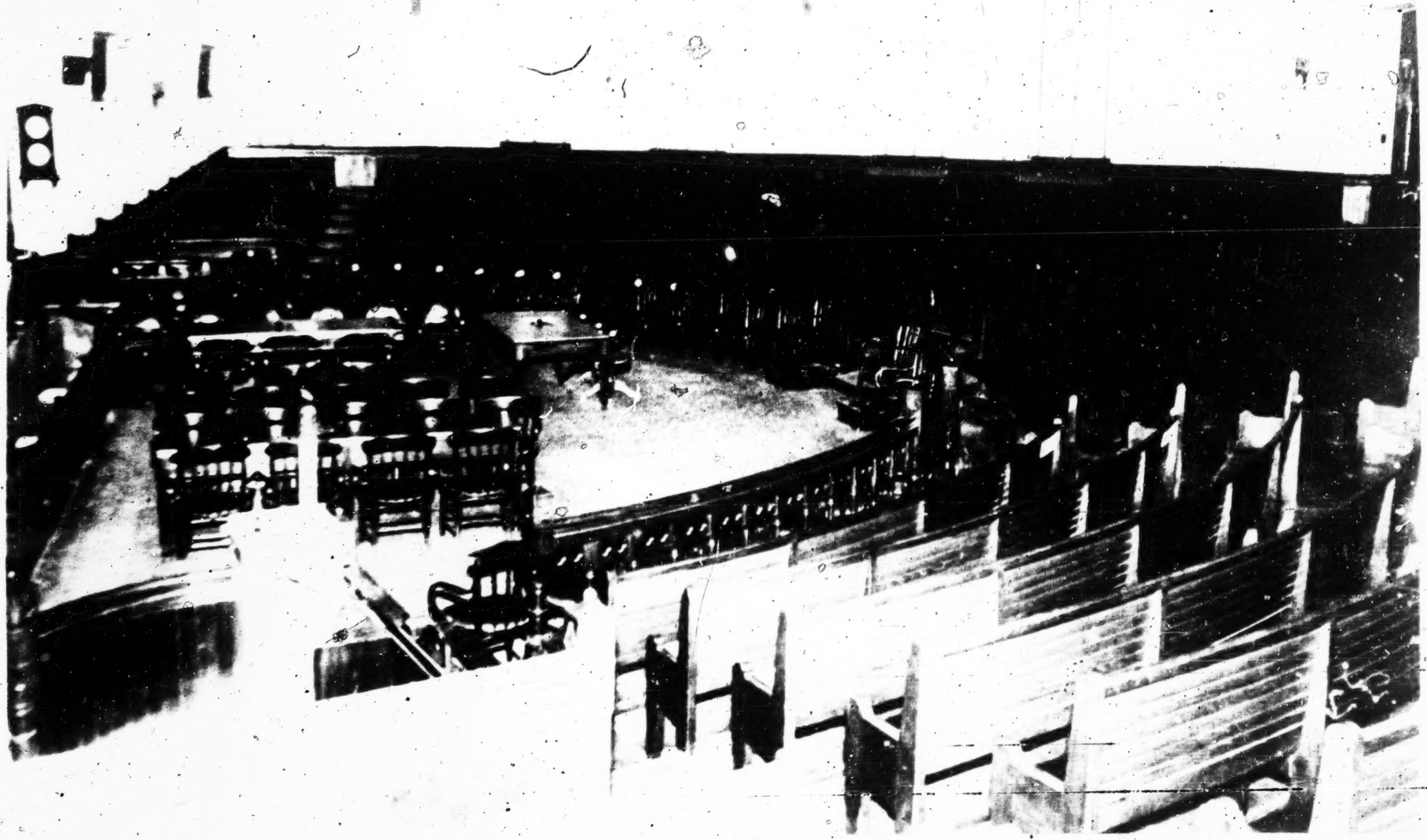
1948 JUNE 14—COURT CALLED AT 10 O'CLOCK A.M.
HON. HIRAM H. KELLER, P.J. AND
HON. CALVIN S. BOYER, J. PRESID-
ING.

EO DIE—COURT RECESSED AT 11:45 UNTIL
1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 4:42
O'CLOCK P.M.

Relator's Exhibit No. 118 (1120 a)





Relator's Exhibit No. 119 (1121a)

RELATOR'S EXHIBIT NO. 123(A).

QUAKERTOWN FREE PRESS,
MAY 20, 1948.

(Page 1).

WBUX Makes Appeal to Find Missing Girl

**Began Broadcasting This Morning from Quakertown and
Doylestown Studios—At 1570 on Your Radio Dial
—Open House Saturday to Observe Programs**

WBUX, the long-awaited Radio Station, came on the air this morning at 9 A.M. Beginning to-morrow, the hours of broadcasting every day in the week is from seven a.m. to eight p.m.

After completing four graveyard shifts of equipment test runs, the station received permission late yesterday from the Federal Communication Commission to begin regular broadcasting today.

This procedure is unusual in the fact that as a rule 10 days' equipment tests are normally required. However, in

view of the fact that the FCC inspector found WBUX in perfect operating condition when he made his tour of inspection on Tuesday, the local station was permitted to cut short its test runs by six days. "It has been a long time since I've seen an installation as complete and efficient as WBUX," was the way FCC inspector Moreland summed up the situation.

The station began commercial broadcasting this morning after conducting impressive inaugural ceremonies from both the Quakertown and Doylestown studios.

* * *

(Italics supplied)

Relator's Exhibit No. 123(C)

RELATOR'S EXHIBIT NO. 123(C).

QUAKERTOWN FREE PRESS,
MAY 27, 1948.

(Page 1).

Selected Jurors—Zeitz-Foster Murder Trial

**Zeitz-Foster Trial Enters 4th Day—Drunken Drivers Head
Court Trials List**

Three Localities Chosen

With both Judge Hiram H. Keller and Judge Calvin Boyer on the bench, criminal court term opened promptly at 10 a. m., in Doylestown on Monday. One of the first announcements to be made in court was the appointment of three new tipstiffs. Mrs. Gwinner, of Doylestown, and Mrs. VanSant were named temporary tipstiffs, while Howard Clymer, of Warrington, former deputy sheriff, of Bucks county, was appointed to a permanent post.

* * *

(Italics supplied)

RELATOR'S EXHIBIT NO. 123(C)

QUAKERTOWN FREE PRESS,
MAY 27, 1948.

(Page 1).

COURT NEWS POPULAR WITH WBUX LISTENERS

Trading Area Extended to Wider Area—Organizations Invited to Send WBUX Their Announcements for Broadcasting—Out of Town Shoppers Visit Studios

The news of the Bucks County Court brought at noon and in the evening over WBUX is proving very popular with the listeners.

WBUX reporters sat at the press table and brought timely news of jury selections, tipstaff appointments, attorney assignments during this week.

* * *

(Italics supplied)

Relator's Exhibit No. 123(D)

RELATOR'S EXHIBIT NO. 123(D).

QUAKERTOWN FREE PRESS,
JUNE 10, 1948.

(Page 1).

New Services Being Added to Programs

**Many WBUX Fan Letters Arrive—Fireman's Parade at
Bristol to be Announced Saturday**

Classified of the Air

Fan letters, postal cards and telephone calls are coming into the WBUX studios at Quakertown and Doylestown every day. Many listeners of this area's radio station turn

1128a

Relator's Exhibit No. 123(D.)

on their radio at 1570 on your dial at seven in the morning and keep it turned in until 8:30 at night when the station leaves the air waves.

* * *

The local news is proving highly interesting and from thirty to forty items of deaths, accidents, graduations, events and meetings are broadcast daily. *The murder trials at the Court house, Doylestown, are being covered by WBUX reporters, and at noon and evening the undertakings of the court are read over the air.*

* * *

(Please turn to Page 2)

Relator's Exhibit No. 123(E)

RELATOR'S EXHIBIT NO. 123(E).

QUAKERTOWN FREE PRESS,

JUNE 10, 1948.

(Page 2).

New Services

(Continued from Page 1)

It is believed that WBUX is the only radio station in Pennsylvania to operate with two complete studios in different towns. Many small stations serving more than one town are limited as to the programs they can present because of the one studio setup.

WBUX, however, is so organized that complete programming of news, music and live talent can be brought to the listeners of Bucks county and the North Penn with equal ease and clear reception.

In keeping with its plan to make the station a true public

service the staff of WBUX constructed two complete control rooms, studios and news rooms at Quakertown and Doylestown so that the finest in radio entertainment would be available to its radio audience.

Both studios are not utilized simultaneously. When the programs are originating at one studio, the other will be available to the public for inspection, for auditions of new talent and entertainment, or for rehearsals of a group which is to appear over WBUX.

(Italics supplied)

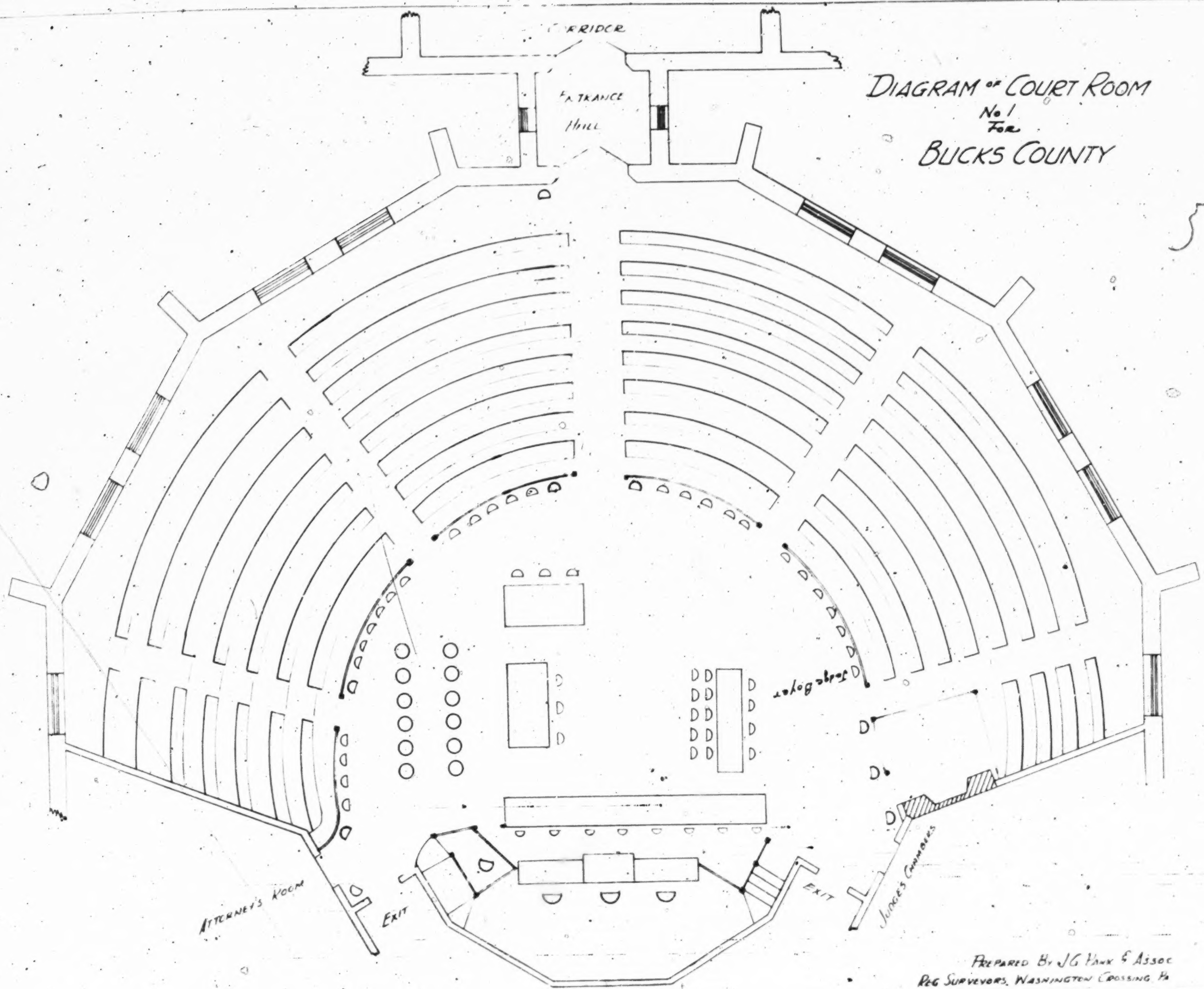


DIAGRAM OF COURT ROOM
No. 1
FOR
BUCKS COUNTY

PREPARED BY J.G. HANK & ASSOC
REG SURVEYORS, WASHINGTON CROSSING, PA
MARCH 15, 1964

Respondents' Exhibit No. 5

(b).

RESPONDENTS' EXHIBITS.

RESPONDENTS' EXHIBIT NO. 5.

CERTIFICATE OF JUDGE HIRAM H. KELLER.

TO WHOM IT MAY CONCERN:

In response to the request by the attorneys for the Commonwealth that the Trial Judge in the case of Commonwealth v. David Darcy, in the Court of Oyer and Terminer and General Jail Delivery of Bucks County, certify or make affidavit as to the conduct of said trial, the undersigned, being duly sworn according to law, deposes and says:

1. He has been a judge of the several courts of Bucks County since March 26, 1929 and President Judge thereof since April 30, 1930.

2. He was assisted by the late Honorable Calvin S. Boyer, as additional law judge from June 21, 1930 until July —, 1949, and by the Honorable Edward G. Biester since August 16, 1949.

3. Honorable Edward G. Biester was district attorney of Bucks County from the first Monday of January 1938 until August 16, 1949 and, as such, prosecuted and conducted the trial in the case of Commonwealth v. David Darcy, as well as the cases of Commonwealth v. Harold Foster, Harry Zietz and Felix Capone, who were jointly charged with the said David Darcy in Bill of Indictment #37, February Sessions, 1948, with having, on the 22d day of December 1947, within the County of Bucks, unlawfully and feloniously killed and murdered one William Kelly.

4. In the prosecution of the aforesaid trials, the said Edward G. Biester was assisted by Willard S. Curtin, assistant district attorney.

5. David Darcy and his three co-defendants were jointly indicted for Murder on February 10, 1948. Darcy and Capone, respectively, petitioned the court for a severance of their trials, which was granted.

6. Foster and Zietz were tried jointly at the May Sessions of Criminal Court, 1948, to wit: from May 24th to June 4th, 1948, inclusive, before a jury, with Honorable Calvin S. Boyer, presiding.

7. David Darcy was separately tried before a jury, with the undersigned sitting as the Trial Judge, during the week following the trial of Foster and Zietz, to wit: from June 7th to 14th, 1948, inclusive.

8. The said David Darcy was represented throughout the trial by the late Webster S. Achey, Esq., and William M. Power, Esq., as his assistant. The said attorneys were not

Respondents' Exhibit No. 5

appointed by the Court to represent the said defendant, but were employed by a relative of Darcy on his behalf.

9. Webster S. Achey, Esq., now deceased, was one of the ablest and foremost active trial lawyers of Bucks County and his ability as such was recognized throughout the eastern section of Pennsylvania. He was formerly Assistant United States District Attorney for the Eastern District of Pennsylvania. His associate, William M. Power, Esq., was an assistant in Mr. Achey's office, and while a young man with less experience, he was, nevertheless, a very good trial lawyer.

10. A venire for one hundred and twenty jurors was called for the first week of May Sessions Trial Court commencing May 24, 1948. The one hundred and twenty jurors called for said week commencing May 24, 1948, together with two special venires comprised, exclusively, the panel from which the jury was selected to try the Foster-Zietz cases. A separate venire was issued summoning one hundred and twenty jurors for the week commencing June 1, 1948. When it became apparent to the Court, during the week of May 24, 1948, that the Foster-Zietz trial could not be completed within that week, the Court directed the Sheriff's office to notify, verbally, the one hundred and twenty jurors who had been summoned to appear for the week commencing June 1, 1948 to appear one week later, to wit: on June 7, 1948.

11. Of the one hundred and twenty jurors summoned to appear for the week commencing June 1, 1948 and who were subsequently notified to appear on June 7, 1948 for the reasons above set forth, eighty-one answered the summons and appeared on June 7, 1948. Thirty-nine of those

summoned were excused by the Court for various reasons, some of them had removed from the county, others were excused because of illness or physical disability, several for urgent business reasons and also several women were excused who had small children at home with no one to care for them.

12. At the outset of the drawing of the trial jury, objection was made by Mr. Achey, as attorney for Darcy, because only eighty-one jurors appeared. We overruled this objection and it developed that the Commonwealth and the defendant were able to select the fourteen jurors out of the eighty-one jurors responding.

13. Prior to the selection of the jurors in the trial of David Darcy, the entire panel of the jurors was detained in a room separate from the court room and, as each juror was called, he was brought into the court room where he was carefully examined and cross-examined on his voir dire by both the district attorney and the defense counsel, in order that the defendant might be tried by a jury free of bias, prejudice or preconceived opinion regarding the guilt or innocence of the accused and, at the same time, not be bound by any prior conscientious scruples against the imposition of the death penalty for murder in the first degree, in the event the facts and law warranted such a verdict.

14. In the selection of the jury in the Darcy panel, twenty-five were challenged for cause by the Commonwealth and thirteen by the defense; seven were peremptorily challenged by the Commonwealth and eleven by the defense; eleven were excused by the Court for various reasons, which were regarded as satisfactory and sufficient, while the remaining fourteen were accepted, sworn and seated.

Respondents' Exhibit No. 5

15. None of the jurors who were accepted and who served on the Darcy trial, so far as this affiant has any knowledge or so far as appeared from any of the questions propounded to them on their voir dire, appeared at the Court House on June 1, 1948, or were present at any of the sessions in the Court House throughout the trial of the Foster-Zietz cases. The jurors who ultimately tried the Darcy case were all selected from the panel summoned to appear on June 1, 1948 but who did not appear until June 7, 1948, for the reasons hereinabove set forth.

16. The trial was held in the main court room with seating capacity of approximately five hundred persons. The attendance at the Darcy trial was surprisingly small, in number, and at no time throughout the trial was the court room more than partially filled.

17. The trial was conducted by both the district attorney and by the attorneys for the defendant in a calm, dignified and orderly manner. There were no incidents, unusual occurrences or disturbances of any kind whatsoever that interfered therewith and, in their arguments, both the district attorney and counsel for the defense, refrained from any emotional appeal to the jury.

18. At no time during the trial, or afterward, were there any emotional outbursts, displays of excitement, indication of prejudice against the defendant, or public demonstrations whatsoever, in the court room or any rooms adjacent thereto. Said trial was completely free of any hysteria. On the contrary, the spectators and other persons present were quiet, well-behaved, attentive and apparently interested in the proceedings.

19. Throughout the trial, the jury was in charge of four competent tipstaves, two men and two women, one of the latter being now deceased, and every precaution was exercised to insure and protect their insulation against being influenced in their verdict in any other manner or by any other means than the evidence and the law pertaining thereto. They were not permitted to talk to any person who was not a member of their jury; they were warned against discussing the case among themselves; and they were not permitted to listen to radio news broadcasts or to read any newspapers containing articles about the trial.

20. During the Darcy trial, the Honorable Calvin S. Boyer, the additional law judge, occasionally joined the undersigned and sat with him at the beginning of the several sessions of court devoted to the trial of the case, for the purpose of transacting miscellaneous business, after which he withdrew when the case was in progress. On several occasions, however, Judge Boyer remained for brief periods while evidence was presented. On one of these occasions, the undersigned conferred with Judge Boyer upon a difficult question of law as to the admissibility of certain evidence introduced by the district attorney, to which defendant's counsel, Mr. Achey, objected, in view of a recent amending Act of Assembly. A side bar conference before the Judge's bench was called, at which time the question was discussed between the undersigned and the defendant's counsel, Mr. Achey, during which Judge Boyer made certain comments. Mr. Achey objected to Judge Boyer taking part therein, whereupon Judge Boyer expressed his opinion that the judges had the right to confer without being obliged to get consent of defense counsel (N. T. p. 831) and withdrew from the bench, and thereafter did not rejoin

Respondents' Exhibit No. 5

the undersigned on the bench during the remainder of the trial.

21. The foregoing conference held at side bar was in low tones of voice and completely inaudible to any person on the jury or the alternates who were trying the Darcy case, and any statements that may have been made at this side bar conference were unheard, unknown and never called to the attention of the jury.

22. At no other time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the undersigned in the trial of this case.

23. Although the undersigned took no part in the trial of Commonwealth v. Harold Foster and Harry Zietz before Judge Boyer, during the week prior to the trial of David Darcy, he sat in the court room on several occasions during said trial, at which time the same conditions prevailed as in the Darcy trial, in that it was quiet, orderly, and free from any disturbance, displays of excitement, prejudice, or evidence of any emotional outbursts or hysteria whatsoever.

24. Although the proceedings of both of the trials of Harold Foster and Harry Zietz and that of David Darcy were publicized through the local and county newspapers as well as Philadelphia, Trenton, and possibly some other newspapers, these reports were read and received as a matter of news by the residents of the county, and the undersigned, a resident of Doylestown, neither heard nor saw any manifestations of hysteria or prejudice having swept the town as the result of these newspaper stories. Further-

more, in view of their answers under oath during their voir dire examination, the undersigned is convinced that the jurors selected had not been influenced by any newspaper stories, radio or other news reports or by any manifestations of prejudice or hysteria against the defendant.

/s/ Hiram H. Keller
Hiram H. Keller

Sworn and subscribed to
before me this 15th day
of March, 1954.

/s/ Mary H. Dunn
Deputy Clerk of Quarter Sessions

Excerpts from Transcript of Trial of Commonwealth
vs. David Darcy, June 7, 1948

IV.

EXCERPTS FROM TRANSCRIPT
OF TRIAL OF
COMMONWEALTH vs. DAVID DARCY,
JUNE 7, 1948.

(1).

VOIR DIRE EXAMINATION OF JURORS.

(a)..

HARRY T. WESTLAKE.

(RELATOR'S EXHIBIT NO. 5A).

(N.T. 96).

HARRY T. WESTLAKE, sworn.

BY MR. ACHEY:

Q. Mr. Westlake, where do you live?

A. Sellersville.

* * *

Q. Have you read anything or heard anything about this case, which is the outgrowth of a robbery down at Feasterville in Bucks County on the night of December 22, 1947?

*Excerpts from Transcript of Trial of Commonwealth
vs. David Darcy, June 7, 1948*

A. Yes, I have.

Q. Have you formed any opinion as to the guilt or innocence of this defendant, David Darcy?

A. Well, I think—yes, I have. It is one of the most cold-blooded murders I ever heard of.

MR. ACHEY: If Your Honor please, I ask —

THE COURT: That will be stricken out.

MR. ACHEY: I object to that answer. It was uncalled for.

THE COURT: Objection sustained. Do not venture any opinion. Just answer the questions in the way they are asked of you.

MR. ACHEY: I would also ask for a mistrial by reason of that statement.

THE COURT: Motion denied.

MR. ACHEY: Exception.

THE COURT: Yes. The jurors already selected will totally disregard that remark or answer made by this juror.

MR. ACHEY: May I ask that this juror be dismissed?

THE COURT: He will be discharged for cause.

Excerpts from Transcript of Trial of Commonwealth
vs. David Darcy, June 7, 1948

(b).

WILLIAM H. SLAUGHTER,

(RELATOR'S EXHIBIT NO. 5B).

(N.T. 218).

WILLIAM H. SLAUGHTER, sworn.

BY MR. ACHEY:

Q. Mr. Slaughter, you live in Doylestown?

A. Yes, sir.

* * *

Q. Were you in Court at any time during the last ten days that they were trying Zietz and Foster?

A. Off and on, yes.

Q. So that you heard the testimony in that case, didn't you?

A. Some of it.

* * *

Q. How many days did you say you were here in court during the trial of the other case?

A. Oh, several days off and on.

Q. What is your condition of health?

A. Very good.

*Excerpts from Transcript of Trial of Commonwealth
vs. David Darcy, June 7, 1948*

MR. ACHEY: If Your Honor please, I challenge the juror for cause, and ask that he be excused from the panel because of having sat in court during the other trial. The district attorney agrees.

MR. BIESTER: We have no objection to that, Your Honor.

THE COURT: I don't think it is a good excuse.

MR. BIESTER: We are not contending it is, but we don't think it is a good precedent.

THE COURT: If there is no objection we will excuse him.

(2).

JUDGE CALVIN S. BOYER'S
PARTICIPATION IN THE TRIAL.

(RELATOR'S EXHIBIT NO. 5E).

(N.T. 830).

MR. BIESTER: * * *

I propose to interrogate Lieutenant Hanlon in reference to this alleged confession in order to have it proven, and then offer it in evidence to guide the jury in fixing the

*Excerpts from Transcript of Trial of Commonwealth
vs. David Darcy, June 7, 1948*

penalty, assuming that the jury returns a verdict of guilty of murder in the first degree. The contention of the Commonwealth is that the jury is entitled to know who the defendant is, and for that purpose we can show any records or confessions of crimes in which the defendant is implicated.

MR. ACHEY: I object to the offer first, because the defendant not having appeared on the stand or testified or any evidence having been introduced in his behalf it is incompetent under the provisions of the Act of 1947, No. 505, which amends the Act of 1911, which lays down the rules affecting the right of the Commonwealth to submit evidence of commission of other crimes.

JUDGE BOYER: That applies only to cross-examination.

MR. ACHEY: I object to Judge Boyer sitting it on this case. I don't mind trying against one Judge —

JUDGE BOYER: The Judges reserve the right to confer without being obliged to get the consent of defense counsel.

MR. ACHEY: In view of the statement which Judge Boyer made to the jury in the trial of Foster and Zietz, which was tried last week, I submit that he has disqualified himself from sitting in on this case, and it is prejudicial to this defendant.

My objection, further, to the offer, is that the evidence of the commission of other crimes is not permissible in this particular case because it is restricted by the amendment of the Act in 1947.

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THE COURT: The objection is overruled. Exception.
(Exception noted for defendant.)

(3).

JUDGE HIRAM H. KELLER'S
CHARGE AND OBJECTION OF
DISTRICT ATTORNEY
EDWARD G. BIESTER.

(RELATOR'S EXHIBIT 5E).

(N.T. 864, 895, 903 and 905).

Ladies and gentlemen of the jury. This has been a rather lengthy trial. This was made necessary because, as it must be obvious to you, of the nature and importance of the case and the large number of witnesses who have testified. I have noted with satisfaction the patience you have exhibited throughout this trial and the careful and undivided attention you have given to the presentation of the testimony. We have now arrived at the point where the case is about to be submitted to you for your determination as to the guilt or innocence of the defendant under this indictment with which he stands charged.

*Excerpts from Transcript of Trial of Commonwealth
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Again, this defendant, like all defendants in a criminal case is entitled to the benefit of any reasonable doubt which may arise from the evidence. The presumption of innocence, as I have already told you, abides with the defendant until the Commonwealth have proved his guilt beyond a reasonable doubt.

By "reasonable doubt" is meant, as indicated by the term itself, a doubt which is reasonable, one that appeals to reasonable men and women, not such a doubt that is sought for or imagined to exist or conjured up in one's mind in order to avoid the discharge of an unpleasant duty, but it is a doubt which fairly and reasonably and honestly arises out of the evidence, or the lack of evidence, or from a conflict in the evidence, and presents itself, and is such as would becloud or confuse your judgment and prevent you from arriving at a satisfactory conclusion. It is more than a mere possible or conceivable doubt, because everything relating to human affairs and depending on oral testimony is open to some possible or imaginary doubt. A "reasonable doubt" is of a real, fair and substantial nature. It is such a doubt as would cause a careful, prudent person, before engaging in matters of importance to himself, to pause and hesitate before acting. If there is, in this case, such a doubt in your minds as to the defendant's guilt, it is your duty to give the benefit of it to the defendant and acquit him. But, if after having considered all of the evidence in this case, including the spoken testimony and surrounding circumstances, you have no such reasonable doubt of the defendant's guilt of the offense, as charged by this bill of indictment, then it is your duty, as the sworn jurors in this case, to render a verdict of guilty of the offense, as you may find the evidence warrants.

Now, in passing upon the question of reasonable doubt,

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this may give rise to the question of credibility, which you may attach to the testimony of these witnesses. It is your duty to weigh the testimony of these witnesses as they have testified before you and determine what credibility you will attach to it. Furthermore, where there is any conflict in the evidence from the witnesses you should try to reconcile it if you can, but if you can not reconcile it then accept that which you believe to be the truth.

* * *

If, however, you should find that the robbery had been fully completed and abandoned, and that the fatal shot was not fired during the escape or flight from the robbery, then you will have to determine whether it was fired at Kelly with a wilful, deliberate and premeditated intent to kill him, while the defendant was acting in concert with the man who fired the shot. If you so find, it will be murder in the first degree.

If you should find it was not done to kill him but merely to injure him, then it would be murder in the second degree.

* * *

Members of the jury, we do not wish to be understood that we express any opinion as to what your verdict shall be or what, in the event of a verdict of guilty of murder in the first degree, what the penalty shall be. This is your problem and your duty as you may conclude from the evidence and the law as we have given it to you.

Have I overlooked anything? Are there any corrections to be made?

MR. ACHEY: Nothing for the defendant, your Honor.

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THE COURT: Members of the jury, a word in conclusion. I have instructed you as to what I understand to be the law bearing upon all the questions that arise in this case, as well as the substance of the testimony bearing upon the shooting, as I recall it. I trust I have made myself clear and that I have succeeded in giving it to you so that you comprehend and understand it. What does it indicate to your minds as jurors?

I may add that in the rendition of your verdict, if you convict this defendant of murder in the first degree, then you will not only have to announce the verdict, but also to announce the punishment, what the punishment shall be.

MR. BIESTER: Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree.

THE COURT: I specifically stated it was completely abandoned in the case of flight or escape.

That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt that this shooting of Kelly did not occur during the perpetration of a robbery.

MR. BIESTER: I am sorry, but I don't think that would be beyond a reasonable doubt, that it would be on the preponderance of the evidence that it was during the commission of a robbery. I think your Honor inadvertently said that they would have to believe that beyond a reasonable doubt that it was not.

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THE COURT: If I did, that will be withdrawn.

MR. ACHEY: I ask for an exception, a general exception of the charge of the Court.

THE COURT: Exception will be allowed.

(Exception noted for defendant.)

THE COURT: Members of the jury, you will now retire.

V.

REQUESTS FOR FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

(1).

RELATOR'S REQUEST.

In accordance with the order entered by this Court under date of November 10, 1954, the Relator submits the following requests for findings of fact and conclusions of law.

Relator respectfully requests the Court to make the following:

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FINDINGS OF FACT

1. That the relator and three companions, Foster, Zeitz, and Capone, on December 22, 1947, engaged in the armed robbery of the Feasterville Tavern near Doylestown in Bucks County, Pennsylvania, and that while the four of them were fleeing in an automobile from the scene of the robbery, a bystander, Kelly, was shot and killed by Zeitz.

Newspaper Publicity:

2. That the newspapers in Bucks County by their accounts of the crime and of the Foster-Zeitz trial that preceded the trial of the relator herein rendered impossible the impaneling of a fair and impartial jury.

3. That immediately following the crime the four leading newspapers of Bucks County—"Doylestown Daily Intelligencer", the "Bristol Daily Courier", the "Newtown Enterprise" and the "Quakertown Free Press", by their articles and editorials dictated the out of court campaign to prejudice the citizens of Bucks County against such defendants and to demand the death penalty for said defendants.

4. That the population of Bucks County during 1947 and 1948 was 107,715 (Rel. Ex. 124, Pennsylvania Manual 1947-1948, R. 375).

5. That the "Doylestown Daily Intelligencer" with its registered office in the Borough of Doylestown, Bucks County, Pennsylvania, during 1948 had a circulation of 5,329 (193, 226-227). Its circulation is principally in Doylestown

and Newtown in the center of Bucks County, although it is widely distributed throughout the county (194).

6. That the "Bristol Daily Courier" is a daily newspaper located in Bristol, Bucks County, Pennsylvania, which during 1948 had an average circulation of 5,397 (265, 372). This newspaper is circulated in lower Bucks County (370), particularly in the municipality of Morrisville, Langhorne, Penndel, Bristol and Bensalen (371). During the period involved the "Bristol Daily Courier" received its news coverage of the Feasterville Tavern holdup, as well as of the other Foster-Zeitz trial and of the Darcy trial, from the "Doylestown Daily Intelligencer" (368-369, 371).

7. That the "Newton Enterprise" is a weekly newspaper published in Newtown, Bucks County, Pennsylvania, and during 1948 had a circulation of 1,972, all within a radius of five miles of Newtown (258-259).

8. That the "Quakertown Free Press" is a weekly newspaper published in Quakertown in the northern section of Bucks County (373), and during 1948 had an average circulation of approximately 5,000, principally within a 25 mile radius of Quakertown (374).

9. That the said newspapers had a widespread circulation throughout all sections of Bucks County. These newspapers were reached and were read by most of the citizens of said county.

10. That the out of court campaign carried on by these newspapers to assure the death penalty for the relator, as well as for the other defendants, commenced immediately following the homicide and grew in intensity. Every detail

of the passion-arousing evidence of the Feasterville Tavern murder was reported by the press in many highly prejudicial articles and editorials:

(a) The "Doylestown Daily Intelligencer" issue of Tuesday, December 23, 1947 (Rel. Exs. 12-13), giving a vivid detailed account of the holdup under the heading "Bandits Shoot 3 Men in Holdup at Two Taprooms", and characterized the defendants as bandits "terrorizing a wide suburban area", including Feasterville and Penndel in Bucks County.

(b) The "Doylestown Daily Intelligencer" issue of December 24, 1947 (Rel. Exs. 14-15), under the heading "Bandits Admit Shooting 5 Persons in Holdups" stated that Bucks County authorities including State Police of Langhorne Sub-station were assisting in the checkup of the series of tavern robberies in the Bucks and Philadelphia Counties' area by a quartet of *trigger happy* youths. The article gave another detailed report of the activities of the defendants and quoted the "leader" as boastful.

(c) The "Doylestown Daily Intelligencer" issue of December 26, 1947 (Rel. Exs. 16-17), under the heading "Murder Now Faces the Four Bandits" in a sub-heading referred to the fact that the "Dead Man Was Shot On Outside of Feasterville Inn When Bandits Fled After Shooting Two Other Men Callously During the Holdup." Under sub-heading "Feeling Runs High" it is stated:

"The general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is 'a break' for society at large to have the trials in Bucks County rather than in Philadelphia."

(d) The "Doylestown Daily Intelligencer" issue of Saturday, December 27, 1947 (Rel. Exs. 18-19), under the heading "District Attorney Is Investigating Murder", again repeated the details of the crime and referred to the prosecution of "Philadelphia's Four Young 'Trigger Happy' Bandits".

(e) The same issue of the "Doylestown Daily Intelligencer" of December 27, 1947, contained the following editorial (Rel. Ex. 20):

FAST POLICE WORK

THE ROUNDING UP of the young gunmen who robbed the Feasterville and Penndel safes, and admitted many other robberies, is something for which we can thank the police of the county and Philadelphia.

What the public and the police will be watching closely is what is done to these potential killers when they come before the bar of justice.

One of the victims of the callous shooting has since died.

Something else that is particularly worth while remembering is the statement of one of the witnesses that one of the young gunmen remarked that it was lucky that no State Police were on the scene, because they also would have been shot.

When we stop to consider the number of policemen who have been killed by trigger-happy bandits, it is not difficult to believe that the gangster meant what he said.

We have always wondered why the police so often take chances with wanted men who are known to be gun-toters and potential killers.

It is especially surprising in view of the miscarriage of justice in Philadelphia recently * * * when a jury

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predominantly made up of women, gave the killer of two cops life imprisonment instead of the electric chair, especially in view of the vicious record of the killer.

(f) The "Doylestown Daily Intelligencer" issue of Monday, December 29, 1947 (Rel. Ex. 21), under the heading "Murder Victim Funeral Held Last Saturday" referred to the murder of Kelly, popular citizen of Trevoose area. This article again repeated all the details of the crime and referred to Kelly as the innocent victim of four "trigger happy bandits".

(g) The "Doylestown Daily Intelligencer" issue of Wednesday, December 31, 1947 (Rel. Ex. 22), contained a passion-arousing editorial headed "Errors of Jurors" and referred to the "Criticism of the Inefficiency of Jurors", and to the fact that "Courts very frankly excoriated juries for acquitting persons when the evidence was regarded as ample by the Judges". The editorial stressed that particularly in murder cases "Juries frequently rendered verdicts that it is difficult to explain".

(h) The "Newtown Enterprise" weekly issue of January 1, 1948 (Rel. Ex. 107-108), under the heading "Easy Xmas Money Was Bandits Aim" referred to the "Four Philadelphia Bandits Who Shot Up Two Taprooms in Lower Bucks County" and gave a detailed and passion-arousing report of the holdup.

(i) The "Doylestown Daily Intelligencer" of January 5, 1948 (Rel. Exs. 23-24), under the heading "Four Held For Murder" referred to four youthful Philadelphians who had been held on the charge of murder.

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(j) The "Doylestown Daily Intelligencer" issue of Friday, January 16, 1948, under the column "The Gossiper" (Rel. Ex. 25) on the editorial page, made veiled, if not direct, reference to the problem of juvenile delinquency, and stressed that (if) "courts and jurors were to dispense with a lot of sentimentality about criminals * * * the general public would not face so many horrible crimes if horrified newspaper readers".

(k) The "Doylestown Daily Intelligencer" of Friday, January 16, 1948, under the column "We Notice" (Rel. Ex. 26), called the readers' attention to the fact "That it takes several hours daily just to give the four young men, charged with murder and now in the county prison their 'daily constitutional'", and that "they also take their showers under the vigilant scrutiny of a prison guard".

(l) The "Doylestown Daily Intelligencer" issue of January 21, 1948, under the column "The Gossiper" on the editorial page (Rel. Ex. 27), stated that "Crime is a one-way street; the Street of Regret", and criticized the assertion that some gangsters had fine parents who endeavored to give them a proper bringing up, citing the case of the notorious gangster "Dutch Schultz".

(m) The "Doylestown Daily Intelligencer" issue of Tuesday, January 27, 1948 (Rel. Ex. 28-29), under the heading "Coroner's Jury Acts in Kelly's Slaying" again refreshed the readers with the details of the Kelly murder.

(n) The "Doylestown Daily Intelligencer" issue of Monday, February 2, 1948 (Rel. Ex. 30), referred to Bucks County citizens who had been "Called as grand jurors" on the editorial page of the same issue (Rel. Ex. 31) under

the heading "You'll Be the Next", referred to the current gruesome story appearing in the Metropolitan newspapers describing the brutal beating of aged men and women on the streets or in their shops by holdup men. The editorial stressed that "If juries and the courts will make examples of these cowardly enemies of society, there will be fewer of their assaults * * * it would be lamentable if citizens were forced to take the punishment of them into their own hands."

(o) The "Doylestown Daily Intelligencer" issue of Tuesday, February 3, 1948 (Rel. Ex. 32-33), under the heading "Traverse Jurors Called" referred to the fact that the criminal court trials were scheduled for Monday, February 16, 1948.

(p) The "Doylestown Daily Intelligencer" issue of Friday, February 6, 1948 (Rel. Exs. 34-35), under the heading "Murder and Manslaughter Cases on Criminal List" that "One Murder case with four accused * * * scheduled for the February Term of Criminal Court among the total of 43 cases, (makes) it one of the most important criminal sessions in a long time * * *." The same issue contains an article "Less Power For Juries" under a Harrisburg date-line and discussed a Philadelphia judge's proposal to relieve juries of the power to fix penalties in cases involving first degree murder on the ground that jurors "do not know how to exercise it".

(q) The "Doylestown Daily Intelligencer" issue of Tuesday, February 10, 1948 (Rel. Exs. 36-37), under the heading "Four Youths Indicted For Feasterville Murder" again gave the passion-arousing details of the crime. The article stated: "Safety in the custody of four State Troopers from

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the Doylestown Sub-station of State Police, four youthful Philadelphians charged with murder of an innocent bystander following a taproom holding up at Feasterville last December, were brought from the Bucks County prison to the courthouse * * *." Article referred to defendants as "trigger happy bandits". The article further stated that the four guarding troopers surrounded the four accused defendants at vantage points—and the sheriff, two deputy sheriffs and county detectives were also on hand.

(r) The "Doylestown Daily Intelligencer" issue of Wednesday, February 11, 1948, contained an editorial and a comment under one of the columns both designed to arouse the passions of the readers. The editorial entitled "Enraged Citizens" (Rel. Ex. 38), condemned leniency by courts and jurors in dealing with criminals and stated that although "Mob Law Is Not the Kind We Want In This Country * * *", there were probably thousands of women who felt like cheering when they read that a convicted rapist, who had been merely fined \$25.00, had been tarred and feathered. Under the column "We Notice" (Rel. Ex. 39), reference was made to the fact "that one of the young men who was charged with murder in connection with the Feasterville shooting, maintains he can't read although he was in the 10th grade in a Philadelphia vocational school. A State Policeman asked 'can he count money', and the prisoner admitted 'it came naturally', but 'insisted he could only sign his name'."

(s) The "Doylestown Daily Intelligencer" issue of Monday, February 16, 1948. (Rel. Ex. 40-41), carried the front page headline "Police Connected Six Bandits Arrested Here To the Number of Robberies and Holdups. * * * They also know members of the boy-murder gang. The article re-

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ferred to the arrest of another Philadelphia robbery gang of six young bandits by two alert Doylestown police officers. The article referred to the police having learned several of the bandits were acquainted with the Philadelphia boy-murder gang that is now in the Bucks County prison awaiting trial on a murder charge. Several of the accused asked about their friends as soon as they arrived at the Bucks County Prison. The front page of the same issue stressed "Ten Young Problems" and stressed that "something to worry about in the way of juvenile delinquency has been furnished by ten Philadelphia boys now incarcerated in the Bucks County Prison" and that "Four of the Boys are Charged with Murder".

(t) That the "Doylestown Daily Intelligencer" issue of Wednesday, February 18, 1948 (Rel. Ex. 42), contained an editorial designed to arouse the passions of the readers against these defendants. Under the heading "Time For An Example", the editorial stated that "The Overflow of Philadelphia's Young Criminals Into Bucks County, Might, It Seems Reasonable To Believe, be discouraged if the crooks were given sentences which would be impressive and get headlines large enough to be seen and become impressive. Stiff sentences have had that effect before". The article referred to "These Criminal Forays Into the County". The editorial concluded with this thought, "Trying to Find Excuses for Enemies of Society Invites More Crimes".

(u) The "Doylestown Daily Intelligencer" issue of Monday, March 1, 1948 (Rel. Ex. 43-44), under the heading "Charged with Murder, Seek Separate Trials", quoted the Judges Miriam K. Keller and Calvin S. Boyer as being critical of the relator's application for a separate trial on the ground that "Separate trials in these cases will mean that it may take a year to dispose of the cases."

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(v) The "Doylestown Daily Intelligencer" issue of Wednesday, March 3, 1948 (Rel. Ex. 45) in another front page article reported that the Court had appointed counsel for Foster, one of the four youths waiting trial for the murder of William Kelly.

(w) The "Doylestown Daily Intelligencer" issue of Friday, April 2, 1948 (Rel. Ex. 46), contains under the heading "Guest Editorial" a reprint of an editorial that had appeared in the Philadelphia Inquirer, entitled "Mild Sentence For Murder".

(x) The "Doylestown Daily Intelligencer" issue of Saturday, April 3, 1948 (Rel. Ex. 47), under the column "The Gossiper" in commenting upon the light sentences given to drunken drivers by the courts, again was aimed at arousing the passion of the readers.

(y) The "Doylestown Daily Intelligencer" issue of Saturday, April 17, 1948 (Rel. Ex. 48), contained an editorial headed "If 'sob sisters' Laid Off" and quoted Judge Harry S. McDevitt, of Philadelphia as telling three holdup men whom he had sentenced to from ten to 30 years in the Eastern Penitentiary that "You wise guys start out with guns and usually wind up in the electric chair". The editorial commented that "Unfortunately * * * there still are Judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public. It seems to be time to stop making a guinea pigs of the law abiding members of society".

(z) The "Doylestown Daily Intelligencer" issue of Friday, May 7, 1948 (Rel. Ex. 49), contained another editorial aimed at arousing the passions of the readers and securing

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the death penalty. This editorial is entitled "Jurors Rebuked Again" and cites a jury as being criticized severely by a court for "its palpably unintelligent or soft-hearted decision in the case of a man accused of a murder of two policemen". The editorial further commented that "It makes it more and more apparent that untrained men and women not familiar with court rules or the proper weighing of evidence, are lacking in temperament or ability to serve efficiently".

(aa) The "Doylestown Daily Intelligencer" issue of Wednesday, May 12, 1948 (Rel. Ex. 50) called the readers' attention to the beginning of the May Term of Criminal Court scheduled for Monday, May 17, 1948.

(bb) The "Doylestown Daily Intelligencer" issue of Friday, May 14, 1948 (Rel. Exs. 51-52), under the heading "Four Murder and Four Manslaughter Trials Listed" stated that four murder cases were listed on the docket for the May Term of County Criminal Court scheduled to open the following Monday, but that only two would be tried during the approaching term, and that two others, Darcy and Capone, would be tried later.

(cc) The "Doylestown Daily Intelligencer" issue of Wednesday, May 19, 1948 (Rel. Ex. 53-54) in another front page article called the readers' attention to the scheduled first week of the May term of Criminal Court, under the article headed "May Criminal Term Jurors".

(dd) The "Quakertown Free Press" issue of Thursday, May 20, 1948 (Rel. Exs. 123(a)—123(b)) contained a front page article headed "JURORS NAMES DRAWN FOR MAY TERM OF COURT" Scheduled to begin on Monday, May 24, 1948.

11. The Bucks County newspapers carried full and complete coverage of the trial of Foster-Zeitz commenced on Monday May 24, 1948 and ended on Friday, June 4, 1948. Daily detailed accounts of the selection of the jury on voir dire examination and of the testimony during the trial were reported in the "Doylestown Daily Intelligencer" issues of that period (Rel. Exs. 55-56, 57-58, 59-60, 61-62, 63-64, 65-66, 67-68, 69, 70-71, 72-73, 74, 75-76, 77), and in the weekly issue of the Newtown Enterprise" for Thursday, June 3, 1948 (Rel. Exs. 109-110). The "Doylestown Daily Intelligencer" issue of Thursday, May 27, 1948 (Rel. Ex. 61), contained a front page photograph headed "Murder Defendants on the way to the Court", and showed defendants Foster-Zeitz handcuffed to police. The "Doylestown Daily Intelligencer" issue of Saturday May 29, 1948 (Rel. Ex. 65) contained a front page article headed "Heard Feasterville Bandits Say They Would Also Like To Have Shot Some Cops". The issue of Tuesday, June 1, 1948 (Rel. Ex. 67, 68) contained another front page article of the Foster-Zeitz trial headed "Why Did They Shoot Me? Murdered Man Asks After He Was Victim of Feasterville Shooting".

12. That the "Doylestown Daily Intelligencer" issue of Saturday, June 5, 1948 (Rel. Exs. 78-79) contains another front page article: "Judge Boyer Praises Jury For Verdict Condemning Two Killers To Electric Chair", and quoted Judge Boyer as stating "I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in in these days. The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decisions".

13. The "Doylestown Daily Intelligencer" issue of Monday, June 7, 1948 (Rel. Exs. 80-87), which was published and circulated before the selection of any juror, contained the front page article entitled "Up To Late Hour This A. M. No Juror Had Been Gotten For Darcy Murder Trial". The article referred to the relator, "Whose partners in crime * * * were found guilty last Friday and sentenced to die in the electric chair" as having gone on trial that morning in Judge Keller's court. The article referred to the defendants as a "trigger-happy gang".

Radio and Television:

14. That radio station WFIL located in Philadelphia, Pennsylvania, with a broadcast radius covering all of Bucks County (267-268, 272) as well as radio station WBUS, of Doylestown, Pennsylvania (272-273), carried news broadcasts both of the Feasterville holdup and apprehension of the defendants, as well as of the Foster-Zeitz and Darcy trials.

15. That television station WFILTV in Philadelphia, with a broadcast range covering the entire Bucks County, on January 21, 1948 run a film broadcast depicting Darcy and the other defendants and commented upon the details of the Feasterville holdup (Ex. 112, 267-272, 587-592).

Public Opinion:

16. Every detail of the passion-arousing crime was reported by the press in articles and editorials prior to the Feasterville-Zeitz trial and also during that trial. The Death—penalty verdict already dictated by the press prior to the Darcy trial was also reflected in the public opinion

generated by said newspaper articles and editorials, and radio and television broadcasts.

17. That there was a widespread public sentiment in all sections of Bucks County that all the defendants involved in the Feasterville holdup should be sentenced to the death penalty. This public sentiment against the defendants permeated throughout the entire Bucks County (110-117, 146-165, 166-175, 239-246, 300-304, 415-430, 567-569).

18. That the public sentiment against the relator and the other defendants prior to the relator's trial was that the defendants "should be hanged, ought to be shot", "ought to be stamped out like bugs" (151), "should burn" (174, 178), "ought to be hanged" or "get the chair" (242), should be lynched, hanged or shot (304), should burn, (379), should get the "hot seat", or should be "taken out and shot or strung up" (420-421), and "did not deserve a trial" (568), but "should be strung up" (569).

19. That Knickerbocker Davis of Doylestown, Pennsylvania, a magazine writer and former war correspondent, who was interested in the problem of juvenile delinquency, after the Feasterville holdup on December 22, 1947 made an independent survey of public opinion of the crime in the Borough of Doylestown and its environs as far north as New Hope. The survey showed that 70% of the 100-150 persons interviewed by Mr. Davis were shocked and outraged by the crime and were of the opinion that the participants deserved the death penalty (419-422, 430).

20. That the public sentiment against the defendants was not only generated by the type of crime involved, but also by the fact that the participants were Philadelphia youths

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who had entered Bucks County to commit the various crimes with which they were charged. Not only did the newspaper articles and editorials above designated make frequent references to the fact that the defendants were Philadelphians who had made "criminal forays" into Bucks County, but also the public sentiment generated by said newspaper articles and editorials reflected the public antagonism and indignation against the "outlanders" from Philadelphia (245, 303, 320-324, 379-380).

Magazine Article:

21. The publicity following the Feasterville holdup of December 22, 1947 was so widespread in scope and intense and passion-arousing in nature that it culminated in a magazine article entitled "Kill-Crazy" in the June 1948 issue of a popular sensational national magazine known as "Front Page Detective" (Ex. 136). That the article contained a detailed account of the holdup and murder, together with pictures of the relator and other defendants. This magazine was circulated and widely read throughout Bucks County (538-542, 550-556, 571-573, 582).

21a. That during relator's trial said magazine was seen being held up in the court room in the hands of spectators, who were pointing at the relator (541-542, 550-556, 571-573, 582).

Relisting of Darcy Trial:

22. That the "Doylestown Daily Intelligencer" issue of Monday, March 1, 1948 (Rel. Ex. 43-44) reported, in effect, that both Judges Hiram H. Keller and Calvin S. Boyer, were opposed to Petition for Severance asking for separate trial

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in the cases of the relator and Capone. The article reported that both judges asked that the matter be heard in further detail that afternoon, "in an effort to have a combination trial if possible, covering all defendants." According to the article, the Court commented "Separate trials in these cases will mean that it may take a year to dispose of the cases."

23. That the relator had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, Section 40, 19 P. S. Pa. Section 785, which provides that in case of felonious homicide that " * * * the parties charged shall have the right to demand separate trials * * *" The purpose of the Act of 1860 plainly was to afford a fair trial to one accused of such crime.

24. That the "Doylestown Daily Intelligencer" issue of Friday, May 14, 1948 (Rel. Ex. 51-52) reported that "4 other cases are listed on the docket for the May Term of County Criminal Court that opens next Monday, but only 2 will be tried during the approaching term." The "Doylestown Daily Intelligencer" issue of Monday, May 24, 1948 (Rel. Ex. 55-56) stated that "only two of defendants (Foster and Zeitz) charged with the murder (in the Feasterville Tavern murder case) will go on trial this term."

25. That neither the District Attorney nor the Assistant District Attorney repudiated the stories published by newspapers as a fact that the relator would be tried at the next term of court (791, 911-912).

26. That the "Doylestown Daily Intelligencer" issue of Friday, June 11, 1948 (Rel. Ex. 93) quotes the following excerpt from the Philadelphia newspaper column "So many trials are cluttering the Bucks County Criminal Docket that

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Doylestown High School Graduates won't be able to hold their commencement exercises in the ancient court-house. Instead they will be graduated outdoors." The rescheduling of the commencement exercises is indicative and corroborative of the fact that the trial of the relator was not originally scheduled to start at the May Term of the Bucks County Criminal Court.

27. That the commencement of the trial of the relator on Monday, June 7th, only three days, after the rendition of the jury verdict and the imposition of the death penalty in the Foster-Zeitz trial, especially after Judge Boyer's commendation of that jury for its verdict "condemning two killers to the electric chair (Rel. Ex. 78), in effect deprived the relator of the separate trial theretofore granted to him by the Court.

Darcy Jury Panel Present in Court on June 1, 1948, During Foster-Zeitz Trial:

28. That the records of the Bucks County Criminal Court show that as of the May Term, 1948, the Court issued two venire to the Sheriff and Jury Commissioners of Bucks County, Pennsylvania, commanding the said Sheriff and Jury Commissioners to empanel the said Sheriff to summon two traverse juries in the Court of Quarter Sessions and Oyer and Terminer, each consisting of 120 qualified according to law, to make up the jury at the term thereof to be held at Doylestown to serve for the term commencing on May 24, 1948, and for the term commencing June 1, 1948 (Rel. Ex. 137(a)-137(d)).

29. That the first scheduled traverse jury reported on May 24, 1948 (Rel. Ex. 137(a)-137(b)). From this jury was selected the jurors who served on the Foster-Zeitz trial.

30. The records of the Bucks County Criminal Court indicate that the traverse jury selected to report on June 1, 1948, did so report on that date. Further, the records indicate under date of June 1, 1948, certain jurors were excused from the May Term of Criminal Court 1948 (Rel. Ex. 137(d)). That from this traverse jury were selected the jurors who served on the trial of the relator herein.

31. That the members of the jury panel who reported in the Bucks County Court House on June 1, 1948 were present in the Court House in which the Foster-Zeitz trial was in progress. Said jurors had the opportunity to attend and to hear the Foster-Zeitz trial.

Fixed Opinions Held by Many Members of Foster-Zeitz Jury Panel:

32. That the records of the Bucks County Criminal Court indicate that the original jury panel summoned to serve on the Foster-Zeitz trial was exhausted before a jury was selected (Rel. Ex. 10(a)-10(g)). The Court thereupon directed that a special venire be issued and that the Sheriff summon and return from the bystanders or from the county at large 50 qualified persons (Rel. Ex. 10(g)). The Sheriff complied with the said Order and summoned said additional 50 jurors (Rel. Ex. 10(b)). Thereafter the Court found that by reason of challenges and otherwise, both the original panel of 120 jurors and the additional panel of 50 jurors had been exhausted without a jury being selected. The Court thereupon issued another Order directing the Sheriff to summon from the bystanders or from the county 25 additional persons (Rel. Ex. 10(g)). 143 persons were examined before a jury of 12 jurors and 2 alternates was finally selected to serve on the Foster-Zeitz trial (Rel. Ex. 10(k)).

33. That the difficulty in the selection of a jury from the original panel that reported was due to the fact that the case had been highly publicized and that the public had prejudged the guilt of these defendants.

Judge Boyer's Participation in Relator's Trial:

34. Judge Calvin S. Boyer, from at least the date of the presentation of relator's Petition for Severance evinced his personal antagonism and hostility against all the defendants.

35. That the "Doylestown Daily Intelligencer" issue of Monday, March 1, 1948 (Rel. Ex. 43-44) quoted Judge Boyer and Judge Keller as commenting "Separate trials of these cases will mean it will take a year to dispose of the cases."

36. That the "Doylestown Daily Intelligencer" issue of Saturday, June 5, 1948 (Rel. Ex. 78-79) quotes Judge Boyer as praising the Foster-Zeitz jury for its verdict condemning "two killers to Electric Chair."

37. That the "Doylestown Daily Intelligencer" issue of Saturday, June 12, 1948 (Rel. Ex. 94-95) under the heading "Judge Boyer Warns That Bucks County Is Tired Of Thieves From Phila.

"Court Warns Youth That County Intends to Do Something About It—Asks Defendant Whether He Wants to Get Into Position of Killers Who Were Sentenced to Electric Chair"

quotes Judge Boyer as asserting that "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which

isn't being watched. * * * What business did you have to come up here in the first place?" Judge Boyer's comments were made in connection with the sentencing of an 18-year-old Philadelphian Robert White who had pleaded guilty to stealing a car radio. He further stated "We in Bucks County are tired of your Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it." The records of Bucks County Criminal Court indicate that, although Judge Keller did not participate in any phase of the Foster-Zeitz trial which had been presided over by Judge Boyer, that Judge Boyer actively participated together with Trial Judge Keller, in the trial of the relator herein.

38. During the trial of the relator, Judge Boyer appeared in the courtroom, together with Judge Keller, when the case was called for trial on the mornings of June 7, June 8, June 9, June 10, June 11, June 12 and June 14, 1948 (Rel. Ex. 115(c), 116, 276-277).

39. That Judge Boyer stated to Knickerbocker Davis during the Foster-Zeitz trial that he thought that the defendants were hardened and callous criminals (432).

39a. That during the course of the relator's trial, Judge Boyer, who had presided at the Foster-Zeitz trial, and had publicly congratulated and commended the jurors on their imposition of the death penalty in that case, appeared at different times in the courtroom. On two occasions he sat in a chair in the section reserved for attorneys where he could be plainly seen and observed by the jury (460-469, 491-497, 498, 513, 522, 524-526, 538, 573-575, 595, 610, 710, 767, 887-888, 925).

40. Judge Boyer, during the relator's trial, at the beginning of each session sat on the bench with Judge Keller. On certain occasions he remained throughout the session and on occasions he left and then returned to the bench. On the times when he sat on the bench with Judge Keller, he assisted and conferred with Judge Keller in the conduct of the trial of the relator and participated in various rulings, particularly regarding the admissibility of evidence (469, 480-481, 522-523, 573, 587, 594, 601-603, 607, 771, 886-887, 920-921).

41. That on the session held on Friday, June 11, Judge Boyer actively participated in the ruling on the admissibility of a joint confession made by all the defendants. The following colloquy occurred with reference to the objection of Mr. Achey, trial counsel for the relator, to the admissibility of said confession (Rel. Ex. 5; Transcript of Testimony in Darcy Trial, pages 830-831).

MR. ACHEY: I object to the offer first, because the defendant not having appeared on the stand or testified or any evidence having been introduced in his behalf it is incompetent under the provisions of the Act of 1947, No. 505, which amends the Act of 1911, which lays down the rules affecting the right of the commonwealth to submit evidence of commission of other crimes.

JUDGE BOYER: That applies only to cross-examination.

MR. ACHEY: I object to Judge Boyer sitting in on this case. I don't mind trying against one Judge —

JUDGE BOYER: The Judges reserve the right to confer without being obliged to get the consent of defense counsel.

MR. ACHEY: In view of the statement which Judge Boyer made to the jury in the trial of Foster and Zietz,

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which was tried last week, I submit that he has disqualified himself from sitting in on this case, and it is prejudicial to this defendant.

My objection, further, to the offer, is that the evidence of the commission of other crimes is not permissible in this particular case because it is restricted by the amendment of the Act in 1947.

THE COURT: The objection is overruled. Exception.

Judge Boyer's participation in the foregoing ruling was observable by both the spectators and jurors (460, 518, 523, 594, 603, 772-773, 785, 896-897, 923-924).

42. Judge Boyer sat as a spectator in the courtroom in the section reserved for attorneys during the evening session held on Friday, June 11, 1948, for the entire session which lasted about two to two and one half hours (468-469).

43. That on Monday, June 14, during Judge Keller's charge to the jury, Judge Boyer was seated in the section of courtroom reserved for attorneys. Next to him was seated District Attorney Biester. Both Judge Boyer and Mr. Biester were seated so that they were plainly observable by the jurors (462, 499, 524-525, 528-529, 530, 594-595, 610-611).

44. That towards the close of the Court's charge, Judge Kelier inquired of counsel for the Commonwealth and for the defense whether he had overlooked anything and whether there were any corrections to be made (Darcy Transcript, Ex. 5, Court's Charge page 32). Mr. Achey, defense counsel, answered that he had nothing to add. The Court thereupon resumed its charge. At this point Judge.

Boyer, who was seated next to District Attorney Biester handed Mr. Biester a note. Mr. Biester read the note then arose from his chair and approached the bench where Judge Keller was concluding his charge. Mr. Biester succeeded in attracting Judge Keller's attention and stated that "I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree".

The Court then stated:

"THE COURT: I specifically stated it was completely abandoned in the case of flight or escape. That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt that this shooting of Kelly did not occur during the perpetration of a robbery.

MR. BIESTER: I am sorry, but I don't think that would be beyond a reasonable doubt, that it would be on the preponderance of the evidence that it was during the commission of a robbery. I think your Honor inadvertently said that they would have to believe that beyond a reasonable doubt that it was not.

THE COURT: If I did, that will be withdrawn.

MR. ACHEY: I ask for an exception, a general exception to the charge of the Court.

THE COURT: Exception will be allowed."

45. That Judge Boyer's participation and assistance in the District Attorney's correction of Judge Keller's instruction to the jury was observable by both the spectators and jurors in the courtroom (463-467, 486-487, 498-504, 524-526, 530-536, 538, 594-599, 609-613).

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46. That the aforesaid presence of Judge Boyer, during the relator's trial both when he sat on the bench with Judge Keller and also on occasions when he sat in the section reserved for attorneys on the Friday evening session, June 11, 1948, and the Monday, June 14 session, was observable by the jurors and was a constant reminder to them of the trial of Foster-Zietz and of Judge Boyer's praise to the jury in the Foster-Zietz trial for their services in having rendered a verdict of guilty with death penalties.

47. That Judge Boyer was adamant in his intent to see that the death penalty was given the relator, as well as the other defendants involved in the Feasterville holdup, is expressed in the following editorial contained in the Doylestown Daily Intelligencer issue of Thursday, June 17, 1948 (Rel. Ex. 105):

RAUS MIT 'EM

JUDGE CALVIN S. BOYER'S warning to tough crooks from Philadelphia and other places to keep out of Bucks county or take the consequences * * * should be impressive * * * because recent juries of men and women convicted three trigger happy young holdup men involved in the killing of a respected resident of Feasterville, without provocation, and recommended their execution in the electric chair.

The warning has been given before, but not under such impressive circumstances.

At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to be vicious lawlessness of a great many young crooks who have operated in the county.

Conviction of even murderers in the first degree with the death sentence have not been numerous in recent years * * * which should convince potential

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bandits and killers that leniency on the part of jurors is not likely to be easy to get.

For a long time jurors or the court have made it clear that they wanted to give the young offenders every chance to show that they would reform * * * but the evidence appears to unmistakably indicate that Bucks countians have concluded that leniency has merely been taken as an indication of weakness. The conviction of the three young men for a wanton and unprovoked murder * * * and the imposition of the death sentence * * * together with Judge Boyer's warning * * * it is to be hoped will cause bandits and killers to steer clear of the county.

Getting tough has worked that way in other instances.

Increase in Intensity of Fixed Opinion of Jurors During Relator's Trial:

48. The atmosphere of prejudice and hysteria surrounding the Feasterville holdup grew in intensity and reached its climax during the selection of the jurors to serve on the relator's trial. One juror examined on voir dire examination, Harry T. Westlake, when asked whether he had formed an opinion as to the relator's guilt or innocence stated, in the presence of three other jurors who had already been selected for service, that "It is one of the most cold-blooded murders I ever heard of" (Darcy Testimony, Ex. 5, p. 97).

49. According to the record of the voir dire examination of prospective jurors in the Foster-Zietz trial, 142 jurors were examined on May 24, May 25, May 26 and May 27 before the jury was completed (Rel. Exs. 10(d)-10(k)). 80

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jurors were examined on the voir dire examination in the relator's trial on June 7 and June 8, 1948 before the jury was completed. In short, a total of 222 jurors were examined on voir dire examination in both trials before the juries were completed.

50. The jurors on both the Foster-Zietz and Darcy panels were selected from all sections of Bucks County.

51. That of those jurors who were thus examined on their voir dire examination in the Foster-Zietz case and were asked the questions, 63% admitted that they had read pertinent newspaper articles, 40% admitted that they had discussed the case, and 20% admitted that they had fixed opinions.

52. That of those jurors who were examined on the voir dire examination in the relator's case and were asked the questions, 89% admitted that they had read pertinent newspaper articles, 50% admitted that they had discussed the case, and 30% admitted that they had fixed opinions. A comparative analysis of the voir dire examinations of the jurors in both cases shows a marked increase in intensity of public sentiment against the relator. There was a 26% increase in the number of jurors, who had been asked whether they read pertinent newspaper articles who admitted they had. There was a 10% increase in the number of jurors, who were asked whether they had discussed the case, who admitted that they had. There was a 10% increase in the number of jurors who were asked whether they had fixed opinions, who admitted that they had such fixed opinions.

53. In the relator's trial approximately one-third of the jurors called to try the relator, who were asked whether

they had fixed opinions stood up in open court and said that they had such fixed opinions derived from reading the newspapers and hearing the case discussed. An examination of the testimony taken on voir dire in the relator's trial reveals a remarkable increase in intensity and fixity of opinion; the crystallization of public sentiment against the relator was apparent.

CONCLUSION.

54. That the relator was tried in an atmosphere of hysteria and prejudice inasmuch as (a) the newspapers in Bucks County by their accounts of the crime and of the trials, including the Foster-Zietz trial, had rendered the impaneling of a fair and impartial jury impossible, the relator having been put to his trial almost immediately after that of Foster-Zietz trial, and (b) Judge Boyer, who had presided at the earlier trial and who had already demonstrated prejudices against all the defendants and elsewhere in the courtroom during the relator's trial and had participated with Judge Keller in the consideration of the ruling adverse to the relator's position and had assisted the District Attorney in making a correction in Judge Keller's charge to the jury.

From the foregoing Findings of Fact, the Relator respectfully requests the Court to make the following

CONCLUSIONS OF LAW.

1. That the Relator was tried in an atmosphere of hysteria and prejudice.

2. That the newspapers in Bucks County by their accounts of the crime and of the trial, including that of Foster and Zeitz, rendered the impaneling of a fair and impartial jury impossible, especially since the Relator had been put to his trial almost immediately after the Foster and Zeitz jury had rendered its verdict of conviction and imposed the death penalties.

3. That Judge Boyer, who presided at the trial of Foster and Zeitz and had already demonstrated prejudice against all the defendants, appeared on the bench, together with Judge Keller, during the Relator's trial and also on two other occasions appeared as a spectator in the court room in the section reserved for attorneys.

4. That on the occasions when Judge Boyer appeared in the court room, either on the bench or in the reserved section, he was observable by the members of the jury trying the Relator.

5. That on the occasions when Judge Boyer sat on the bench with Judge Keller, Judge Boyer actively participated in the consideration of rulings on the admissibility of evidence.

6. That on the occasions when Judge Boyer sat as a spectator in the court room, he was seated next to District Attorney Biester. On one of said occasions, during Judge Keller's charge to the jury, he actively assisted District Attorney Biester in the prosecution of the Commonwealth's case by making a written suggestion and delivering it to the District Attorney, thereupon calling Judge Keller's attention to what he considered an error in the Trial Court's charge to the jury.

7. That approximately one-third of the jurors called to try the Relator, who were asked the question, stood up in open court and said they had fixed opinions derived from reading the newspapers and hearing the case discussed which they could not and would not change. The comparison of the voir dire examination of the jurors in the Foster and Zeitz trial and the Relator's trial reveals a remarkable increase in the fixity of opinion against the Relator.

8. That public opinion, generated by newspaper articles and by the public's discussion of the case, was that the Relator, as well as the other defendants, were guilty and should be given the death penalty.

9. That, although the Relator had been granted a severance, in fact he did not receive a separate trial.

10. By reason of the foregoing, the Relator did not have a fair and impartial trial as is contemplated and guaranteed by the Commonwealth's Constitution and the United States Constitution.

Respectfully submitted,

/s/ CHARLES J. MARGIOTTI,
CHARLES J. MARGIOTTI, Esq.,
Pittsburgh, Pa.,

/s/ J. DRESS PANNELL,
J. DRESS PANNELL, Esq.,
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Attorneys for the Relator.

(2).

RESPONDENTS' REQUEST.

1. On April 12, 1948, two separate venire issued to empanel and summon 120 persons for each venire as traverse jurors in the Courts of Quarter Sessions of the Peace and Oyer and Terminer and General Jail Delivery of Bucks County, Pennsylvania. Jurors for the first venire were summoned to appear May 24, 1948. The jurors for the second venire were summoned to appear June 1, 1948. There had previously been scheduled a regular term of Court of Quarter Sessions of the Peace and Oyer and Terminer and General Jail Delivery to commence on May 17, 1948, the first week thereof being set aside for the Grand Jury, to be followed by two or more weeks of traverse jury. Although traverse jurors summoned in both of the venires were subject to service from the date of their respective appearances to the end of the term of Court, it was the custom of the Courts of Bucks County, Pennsylvania, to summon one panel for the first week of jury trials and an entirely separate panel for the second week, the first week's panel being excused for the term at the conclusion of one week's service, except for any jurors engaged in the trial of a case not concluded by the end of the week.

2. Listed for trial at the May Term of Court, 1948, was Bill of Indictment No. 37, February Sessions, 1948—Commonwealth of Pennsylvania vs. Harold Foster, Harry Zietz, David Darcy and Felix Capone, 1st Count, Murder. Upon proper application, a severance was granted to David Darcy and Felix Capone. Several weeks prior to May 24, 1948,

the District Attorney notified counsel representing each Defendant that Harold Foster and Harry Zietz would first be tried together, and thereafter, as soon as the first trial was completed and the Court would sit, the case against David Darcy would commence. No objection was raised to this procedure by counsel for David Darcy, and no application for a continuance was filed by David Darcy's counsel.

3. On May 24, 1948, the Court, Hon. Calvin S. Boyer presiding as trial judge, proceeded to draw a jury and try the case against Harold Foster and Harry Zietz. A jury of twelve and two alternates was selected and sworn on May 26, 1948. None of the persons summoned as veniremen, or examined on voir dire, or sworn as jurors or alternates in the case against Harold Foster and Harry Zietz were the same as any of the 120 persons summoned to appear as veniremen on June 1, 1948. On Friday, June 4, 1948, at 1:25 P. M., the jury rendered a verdict of guilty of murder in the first degree and imposed the death penalty as to both Defendants, Harold Foster and Harry Zietz.

4. The panel of traverse jurors originally summoned to appear on June 1, 1948, did not appear in the Bucks County Court House until June 7, 1948. When it became obvious that the trial of Harold Foster and Harry Zietz would not be completed during the first week of trials, the Court directed the Sheriff of Bucks County to notify the persons summoned to appear on June 1, 1948, to appear on June 7, 1948. None of the jurors who were subsequently sworn as jurors or alternates to try the case of Commonwealth of Pennsylvania vs. David Darcy appeared or received pay for appearing on June 1, 1948, all of said persons first appearing and receiving pay for service on June 7, 1948. None of the jurors or alternates sworn to try the case against

David Darcy were present in Court during any of the trial of the case of Commonwealth of Pennsylvania vs. Harold Foster and Harry Zietz.

5. Of the panel of jurors originally summoned to appear on June 1, 1948 (later notified to first appear on June 7, 1948), eighty-one persons appeared. Thirty-nine of those summoned failed to appear due to return of "non-est" or otherwise excused by the Court on or prior to June 7, 1948. Objection was raised by counsel for David Darcy that only eighty-one of the one hundred twenty originally summoned appeared, but no other objection or challenge was made to the panel of jurors who appeared, prior to the examination of prospective jurors on voir dire.

6. The panel of eighty-one jurors who appeared on June 7, 1948, were removed from the Main Court Room to other rooms located on the floor above the Main Court Room. The jurors were then separately called into the Main Court Room and examined individually, as respective names were drawn by the Clerk of Courts. Any juror who was called and challenged was kept separate and apart from the rest of the jury panel, so that no juror had any knowledge of preceding voir dire examinations prior to being interrogated on voir dire.

7. A jury of twelve persons and two alternates was selected and sworn on June 8, 1948, after eighty jurors of the panel had been examined on voir dire. Counsel for defense took ten pre-emptory challenges, and the Commonwealth took eight pre-emptory challenges. Twenty-five persons were challenged because of conscientious objections to capital punishment. Eleven jurors were challenged because of fixed opinions of the case. The others were chal-

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lenged or excused for various reasons, including physical disabilities, family necessity, and personal acquaintanceship with the District Attorney.

8. After the first juror, W. D. Pardoe, was accepted by both sides, a tipstaff, Clarence H. Dannenhower, was placed in charge of the juror. Thereafter, as jurors were selected, they were kept with the other juror accepted, at all times entirely segregated and out of communication with all other persons, in charge of one or more tipstaves. The Court instructed the jurors selected that they were to talk to no one or allow anyone to talk to them, except among themselves and the tipstaves who were in charge of the jury. They were further advised not to discuss the case among themselves, until properly called upon to deliberate the case. These instructions were carried out fully by the jurors and the tipstaves.

9. At the time the jury was sworn, four tipstaves were placed in charge of the jury. They were Clarence H. Dannenhower, Mrs. Ethel M. Van Sant, Gideon Gehman, and Mrs. Jessie Gwinner. The jury at all times throughout the trial was kept in a body separate and apart from all other persons and under the personal supervision and observation of the tipstaves. The jury was fed and lodged at the Doylestown Inn, a local hotel approximately two blocks from the Bucks County Court House. All clothing and articles of personal belongings were obtained for the jurors by the tipstaves telephoning to the homes of the respective jurors and requesting that the articles be delivered to the tipstaves. All belongings were personally searched by the tipstaves in the presence of the juror before being delivered

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to the juror. No reading material of any kind was delivered to the jurors. The jurors heard no radio programs during the trial, read or saw no newspapers, magazines or other reading material, and viewed no television programs. The hotel rooms allotted to the jurors had no radios or television sets. The jurors ate at a separate table in the rear of the dining room of the Doylestown Inn. In the evenings a separate room was set aside for the jury, where they remained until time to retire. Jurors were instructed not to leave their rooms after retiring, but were not locked from the outside due to fire hazards. At the end of the corridor Tipstaff Danenhower occupied a hotel room; he kept his door open at night in order to be sure that no one left the rooms or that any persons entered the rooms.

10. The jury traveled between the Court House and the Doylestown Inn each session on foot, in a body, with tipstaves at the front, rear and on the sides of the jury. The jury always traveled in a close group. On several occasions the jury took short walks about Doylestown for necessary exercise. At no time did the jurors talk to any persons other than themselves or the tipstaves, nor did any persons seek to talk to them. The jury always entered and left the jury box and Court House through a rear corridor leading from the rear of the Court House directly into the main floor of the Court Room, a few feet from the respective seats of the jury. The corridor used by the jury was not generally used by the public. At no time was the jury taken through the front or main entrance to the Court House, or through or near any spectators or witnesses present in Court. At no time was the jury taken near or through any crowds or groups of persons, either inside or outside of the Court House.

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11. The jurors neither heard nor saw anything whatsoever concerning the case from the time each was accepted as a juror until after the verdict was rendered and the jury polled and dismissed, except that which transpired in the Court Room during the trial proceedings, and the view of the locus of the offense under Court supervision.

12. The jurors saw no magazines, books, newspapers or other reading material during the course of the trial, except that which was introduced and received in evidence.

13. There were no public demonstrations of any kind during the course of the trial against the Defendant David Darcy or any of the other Defendants who had been jointly indicated with David Darcy. There were no outbursts or displays of mass or public emotion in the Court Room, the Court House, or the Borough or vicinity of Doylestown, Pennsylvania, during the course of the trial. There were no threatening gestures or menaces or attempts of violence toward David Darcy, defense counsel, or any of the jurors during the course of the trial, either in or out of the Court House.

14. The Court Room where all of the trial took place seats approximately six hundred persons. The Court Room was at no time during the trial more than approximately half full of spectators and witnesses. There were no more persons present in and about Doylestown than normal for a week of Criminal Trial Court. There were no disturbances of the public peace and quiet in the Borough of Doylestown at any time during the trial or period of time in which the trial took place.

15. The jurors heard no remarks of any spectators or witnesses in the Court Room or elsewhere, except such as was stated under oath by the witnesses on the stand and as appears in the Transcript of the Testimony of the trial.

16. No unusual precautions were taken or ordered to be taken to maintain order, either in the Court House or in the Borough of Doylestown or elsewhere in the County of Bucks during the trial. In the trial, certain Pennsylvania State Policemen, not in uniform, assisted the Sheriff's Office in guarding and conducting David Darcy from the Bucks County Prison to the Bucks County Court House. The only uniformed persons in the Court Room were approximately ten tipstaves, which was the usual number of persons on duty during criminal trials.

17. During the trial, David Darcy was lodged and fed at the Bucks County Prison, located approximately three blocks from the Bucks County Court House. He was transported between the Prison and the Court House by automobile in the direct custody of the Sheriff and Cpl. Harold Dando, Pennsylvania State Policeman in charge of the Doylestown sub-station. David Darcy entered and left the Court Room by the same door and corridor used by the jury. Cpl. Dando was not uniformed and carried a firearm concealed from public view. Shortly before the Court would convene David Darcy was brought into the Court Room and seated in a chair in front of the benches reserved for spectators and witnesses. The row immediately behind the seat of David Darcy, as customary in important trials, was kept blocked, so that spectators could not sit in the first row directly behind the Defendant. When the trial would be

about to proceed, David Darcy would move forward to defense counsel's table with his attorneys; the guarding officers remained in the chairs immediately in front of the spectators' benches. At no time were any threats, threatening gestures, menacing language or other improper conduct directed toward David Darcy, either in or outside of the Court House. At no time was David Darcy taken through or near any crowds or groups of persons. There were no crowds or large groups of persons congregated around any of the entrances or exits of the Court House or the Bucks County Prison or in the Vicinity. At no time during the period of the trial was there any more than normal traffic, both pedestrian and vehicular, on the streets or public thoroughfares and buildings in and about Doylestown.

18. Hon. Calvin S. Boyer, who had presided as Judge during the trial of Harold Foster and Harry Zietz, maintained his chambers and office in a room leading directly from the Main Court Room. During the course of the trial, as was the usual custom, at the opening of Court in the morning and in the afternoon both Judge Keller and Judge Boyer would go on the bench to receive any miscellaneous papers that attorneys wishes to present, both as to criminal and civil matters. The trial of David Darcy was before Hon. Hiram H. Keller, the President Judge of the Seventh Judicial District of Pennsylvania. When miscellaneous matters, if any, were concluded, the trial of David Darcy would proceed. On occasions, Judge Boyer would remain on the bench, beside Judge Keller, for varying lengths of time. Judge Boyer at no time, however, acted as a trial judge. He asked no questions of any witnesses, he made no remarks to counsel for either side in the hearing of the jury, and he

gave no instructions to the jury. On occasions, Judge Boyer left the bench to attend other matters.

19. While the trial against David Darcy was being heard before Hon. Hiram H. Keller in the Main Court Room, among other business taken up by Judge Boyer was the taking of testimony and sentencing on a plea of guilty of one Howard White. This took place in a separate Court Room located on the second floor of the Bucks County Court House, referred to as the "Grand Jury Room". None of the jurors sitting on the David Darcy case heard or were aware of anything concerning the sentencing of Mr. White or heard or were aware of any remarks Judge Boyer may have made in respect thereto, at least until after they had rendered the verdict and been dismissed by the Court. Any newspaper accounts of what transpired during the sentencing, whether the newspaper reports were accurate or not, were likewise unknown to the jury.

20. During the course of the trial, an objection was made by defense counsel to the admission of a certain Commonwealth exhibit (CX-71), the joint statement of David Darcy, Felix Capone, Harold Foster and Harry Zietz). A side-bar conference was then held between defense counsel, the District Attorney, and Judge Keller. Judge Boyer, who was present during the conference, stated: "That applies only to cross-examination." Mr. Achey, defense counsel, then stated: "I object to Judge Boyer sitting in this case. I don't mind trying against one Judge." Judge Boyer replied: "The Judges reserve the right to confer without being obliged to get consent of defense counsel." Thereafter, Judge Keller overruled the objection, and the trial pro-

ceeded. None of the jurors overheard any part of the sidebar conference. Judge Boyer remained on the bench for a short period of time afterward but thereafter left the bench and did not return or sit on the bench again at any time while the trial was actually in process. At no time during the trial did Judge Boyer take any active participation in the trial.

21. During the charge of the Court, the District Attorney sat with his assistant, Willard S. Curtin, in the front row of a group of chairs reserved for lawyers. Near the conclusion of the charge, Judge Keller asked counsel if there was anything to be stated. Defense counsel made no reply. The District Attorney arose and suggested orally that certain portions of the charge be clarified by Judge Keller, on a question of law. A short discussion took place between the District Attorney and Judge Keller, after which Judge Keller completed his charge. Nothing in writing was at that time handed to Judge Keller by the District Attorney. Judge Boyer did not sit on the bench during the charge.

22. At all times throughout the trial both Judge Boyer and Judge Keller wore street attire, the Court not being robed.

23. Judge Boyer occasionally sat on a chair a few feet outside of the doorway to his chambers, where he listened to the proceedings of the trial as a spectator. At no time did Judge Boyer sit at the Commonwealth's counsel table, or confer with or assist the District Attorney or his staff in the prosecution of the case or the presentation of evidence.

RESPONDENTS' REQUEST FOR CONCLUSIONS OF LAW.

1. This proceeding is, in substance, a suit against the Commonwealth of Pennsylvania.

2. The Commonwealth of Pennsylvania has not either expressly or impliedly consented to this suit.

3. The Eleventh Amendment of the Constitution of the United States is a bar to the entertainment of this proceeding by this Court.

4. Under our constitutional system it was never intended that the lower Federal courts or the judges thereof should review State court action by habeas corpus or otherwise.

5. This Court has no power, under the Constitution of the United States, to review the judgment of the Court of Oyer and Terminer of Bucks County, Pennsylvania, pursuant to which the applicant-relator is presently detained in the custody of the Commonwealth of Pennsylvania.

6. The applicant-relator has not exhausted available state corrective judicial process, and, hence, this Court has no power to entertain this proceeding.

7. The applicant-relator is not being detained in the custody of the Commonwealth of Pennsylvania in violation of the Fourteenth Amendment of the Constitution of the United States.

8. The rule to show cause should, therefore, be discharged.

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the petition dismissed and the applicant-relator remanded into the custody of the Commonwealth of Pennsylvania.

Respectfully submitted,

/s/ DONALD W. VAN ARTSDALEN,
District Attorney of Bucks County,
/s/ RANDOLPH C. RYDER,
Deputy Attorney General,
/s/ FRANK P. TRUSCOTT,
Attorney General,
Counsel for Respondents.

VI.

OPINIONS OF UNITED STATES DISTRICT COURT.

(1)

OPINION DENYING PETITION.

This case is here on remand,¹ a majority of the Court of Appeals having ruled that opportunity must be afforded relator to prove the allegations in his petition for habeas corpus, insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the court

¹United States, ex rel. Darcy v. Handy, Warden, et al. (argued January 7, 1952; reargued December 1, 1952), 3 Cir. March 24, 1953, as amended March 28, 1953, 203 F. 2d 407. Rehearing denied April 29, 1953; cert. den. 346 U. S. 865, 74 S. Ct. 103, 98 L. Ed. 375 (October 26, 1953). Mandate received November 4, 1953.

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room.² After a hearing was scheduled³ respondent moved⁴ to dismiss contending that the court lacked jurisdiction and judicial power to conduct the inquiry or to grant the writ. The motion is without merit. Similar questions were disposed of contrary to respondent's position in an opinion by Judge Goodrich speaking for the full court in *United States, ex rel. Elliott v. Hendricks*, June 2, 1954,⁵ 213 F. 2d 922. See *Id.* at 929. "We cannot have any doubt, even were the question a new one, that the federal power is ample, under the Constitution, to authorize the use of habeas corpus procedure to test the question whether one confined under

² Cf. opinion Maris, J., joined by Judges Goodrich and Staley, *Id.* 203 F. 2d at 420. We previously dismissed the petition because, in our judgment, its allegations were refuted by the record in the Pennsylvania courts. See *United States, ex rel., Darcy v. Warden, et al., D. C. M. D. Pa.*, May 17, 1951, 97 F. Supp. 930, and see *United States v. Hendricks*, 3 Cir. 213 F. 2d 922 at 930, 931; *Brown v. Allen*, 1953, 344 U. S. 443, 457-458, 463, 73 S. Ct. 397-410, 97 L. Ed. 469; *United States, ex rel., Smith v. Baldi*, 1953, 344 U. S. 561, 569, 570, 73 S. Ct. 391, 97 L. Ed. 549. A majority of the Court of Appeals agreed (see 203 F. 2d 407, *supra*) that there was no merit in relator's allegation of incompetency of his trial counsel, see *United States, ex rel., Thompson v. Dye*, 3 Cir. March 26, 1953, 203 F. 2d 429, cert. den. May 18, 1953, 345 U. S. 960, 73 S. Ct. 946, 97 L. Ed. 1380. (cf. opinion of Chief Judge Biggs, joined in by McLaughlin, J., 203 F. 2d, *supra*, at 410).

³ Conference January 22, 1954; hearing set for February 17, 1954; continued because of illness of Mr. Margiotti to March 9, 1954; Mr. Van Artsdalen engaged before Grand Jury to February 11, 1954.

Order March 5, 1954, to produce relator at hearing. Order November 5, 1953, staying execution of death penalty until court has acted upon and finally disposed of petition for writ of habeas corpus. Order March 12, 1954, striking jurors' letters from petition.

⁴ March 4, 1954. The alleged violation of the XI Amendment, United States Constitution, was first raised in respondent's petition for certiorari; denied 346 U. S. 865. See Note J, *supra*.

⁵ Argued December 22, 1953. The Attorneys General of 40 states supported claim of the Attorney General of Pennsylvania of unconstitutionality. The United States Attorney General filed a brief contra-

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state process is, in that confinement, deprived of his rights under the Constitution of the United States. Nor have we doubt that the power may be assigned to all the federal judiciary or part of it. If the authority of federal courts is to be more limited than that provided by the present statute, that limitation must be made by the Congress." And see Mr. Justice Reed in *Brown v. Allen*, supra, 344 U. S. at 460, 464, 478, 486, and Mr. Justice Frankfurter, Id. at 508, "Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus"? Id. 510, "Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted."

See Mr. Justice Black at p. 549 Id., "I agree with the Court that the District Court had habeas corpus jurisdiction * * * including power to release * * * if (the prisoner) is held as a * * * violation of constitutional rights. This I understand

to be a reaffirmance of the principle embodied in *Moore v. Dempsey*, 261 U. S. 86."

Has the applicant met the burden of showing that he has exhausted the remedies available in the state courts within the meaning of 28 U. S. C. A. §2254, *Darr v. Burford*, 339 U. S. 200 at 218, 70 S. Ct. 587, 94 L. Ed. 761, *Brown v. Allen*, 344 U. S., *supra* at 448-450, 486, 487? Respondent argues that the Pennsylvania Supreme Court did not directly meet and dispose of the question of hysteria and prejudice. See *Commonwealth, ex rel. Darcy v. Claudy*, April 10, 1951, 367 Pa. 130, 79 A. 2d 785

The Court of Appeals, however, found *contra*. See opinion C. J. Biggs, 203 F. 2d, *supra* at 411, describing the opinion in 367 Pa. as "passing on every substantial ground alleged in the petition." See and cf. *Brown v. Allen*, *supra*, 344 U. S. at 458; *Smith v. Baldi* February 9, 1953, 344 U. S. 561, 73 S. Ct. 391, 97 L. Ed. 49; *Commonwealth, ex rel., Elliott v. Baldi*, 373 Pa. 489, April 14, 1953, 96 A. 2d 122, cert. den. June 8, 1953, 345 U. S. 976, 73 S. Ct. 1125, 97 L. Ed. 1391.

A remedy may be exhausted by affirmative use thereof and failure therein or by inaction or failure to resort thereto.

Assuming *arguendo* there was some evidence of hysteria and prejudice before or at the trial, the law of Pennsylvania affords a number of methods of raising the question and spelling it out on the record and in the event of an adverse

" See sentiments of Judge Goodrich, *United States, ex rel., Smith v. Baldi*, 3 Cir. 1951, 192 F. 2d 540, 543; Mr. Justice Jackson, *Brown v. Allen*, 344 U. S. at 532; Mr. Justice Reed, *Darr v. Burford*, 1950, 339 U. S. 200 at 217, 70 S. Ct. 587 at 597, 94 L. Ed. 761, and see Report Committee on Habeas Corpus of Judicial Conference of United States, July 16, 1954, supplement September 16, 1954, and recommended legislation. Report of Special Committee on Habeas Corpus to the Conference of Chief Justices, June 1953.

"As to Judge's McLaughlin (see *Id.* 203 F. 2d 419), Kalodner and Hastie (at 420), Maris (at 420-428), Goodrich and Staley *Id.*

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decision reserving it for review on appeal to the Supreme Court of Pennsylvania and on certiorari to the United States Supreme Court. Pre-trial, by challenging the array, see *Commonwealth v. Zell and Herr*, 81 Pa. Super. Ct. 145 at 150, or by motion for continuance, *Commonwealth v. Balles*, 160 Pa. Super. Ct. 148, 150-151, 50 A. 2d 729, or change of venue, *Commonwealth v. Karmendi*, 328 Pa. 321, 339, 342, 195 A. 62. The Pennsylvania Supreme Court itself could upon proper showing remove the indictment to another county for trial, *Commonwealth v. Ronemus*, 205 Pa. 420, 54 A. 1095. At trial, by motion for withdrawal of juror, *Commonwealth v. Mehlman*, 163 Pa. Super. Ct. 534, 544, 63 A. 2d 400. Post-trial, by motion for new trial, *Commonwealth v. Deni*, 317 Pa. 289, 293, 176 A. 919. Finally, on appeal and on petition for certiorari to the United States Supreme Court.

No such question was suggested either before, during or after the trial. See Rel. Ex. Nos. 4, 5, 10, 115, 116, 137; the motion for a new trial and opinion denying same, the assignments of error and statements of question involved on appeal, see paper books Supreme Court of Pennsylvania, 362 Pa. St. 259-286; *Commonwealth v. Darcy*, May 26, 1949, 362 Pa. 249, 66 A. 2d 563, rehearing refused June 24, 1949.

The petition for certiorari (No. 96 Misc.), denied October 1949, 338 U. S. 862, 70 S. Ct. 96, 94 L. Ed. 528, raised only questions as to the jury view of the locus in quo and the charge of the court on presumptions from the use of a deadly weapon.

August 1, 1949, relator petitioned the Supreme Court of Pennsylvania for a writ of habeas corpus complaining that at the trial, over objection, the jury heard testimony as to offenses committed by defendant other than that named in the indictment. Petition denied without opinion August 12, 1949 (not reported); certiorari denied (No. 102 Misc.) October 23, 1949, 338 U. S. 862, 70 S. Ct. 96, 94 L. Ed. 528.

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The question was not raised until after the relator failed in his attempt to have the Pennsylvania Board of Pardons commute his sentence to life imprisonment. (April 1950, denied May 5, 1950; application for reargument granted June 1950, continued to March 20, 1951, rejected March 21, 1951; again on March 29, 1951, rehearing denied March 30, 1951). April 2, 1951, relator's petition to the Supreme Court of Pennsylvania for certiorari to the Court of Oyer and Terminer of Bucks County, and for reargument nunc pro tunc, claimed denial of due process of law alleging that his trial counsel did not permit him to testify at his trial (cf. opinion Biggs, J., 203 F. 2d at 410, Maris, J. at 420); did not produce witnesses as to his background, good behavior, character or reputation although they were available; the proximity of the two trials; jurors' letters and opinions; hysteria; Judge Boyer's commendation and participation; and failure to continue the case. Denied without opinion April 3, 1951 (No. 429 Misc. Docket No. 9). Relator did not seek certiorari from the United States Supreme Court.

April 3, 1951, the present petition was filed in the district court. We withheld ruling thereon to afford relator an opportunity to seek a writ of habeas corpus from the Supreme Court of Pennsylvania, raising the precise questions and, if he failed therein, to seek certiorari from the United States Supreme Court. The petition filed April 9, 1951, was denied April 10, 1951, Commonwealth, ex rel., Darcy v. Claudy, 367 Pa. 130, 79 A. 2d 785.*

Application for certiorari filed June 12, 1951; denied October 8, 1951, 342 U. S. 837, 72 S. Ct. 61, 92 L. Ed. 632.

In his petition for certiorari filed June 12, 1951, relator's counsel at p. 7 states "All these facts were ascertained as a

* After we dismissed relator's petition, on appeal the Court of Appeals allowed a stay of execution. See Note 1, supra.

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result of investigation by present counsel of the Petitioner and were presented to the Supreme Court of Pennsylvania for the first time in the Petition for Writ of Habeas Corpus which it refused on April 10, 1951.⁹ And at p. 3; “* * * former counsel of Petitioner either failed to set forth said additional reasons or were unaware of the said additional reasons which for the most part were the result of investigation by present counsel.” And see *Id.* p. 12, “* * * former counsel, employed after the petitioner’s conviction and prior to the employment of present counsel, either failed to include * * * or perhaps were unaware of the facts * * *.”

Res adjudicata does not apply. *Salinger v. Loisel*, 265 U. S. 224 at 230, 44 S. Ct. 519, 68 L. Ed. 989, see and cf. *Brown v. Allen*, *supra*, 344 U. S. at 458; and *Price v. Johnston*, 334 U. S. 266 at 291, 66 S. Ct. 1049, 92 L. Ed. 1356, “If for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.” But cf. *Id.* at p. 289, *Wong Doo v. United States*, 265 U. S. 239, and see dissent 334 U. S. at 296, 297; *Darr v. Burford*, *supra*, 339 U. S. at 203; *Brown v. Allen*, *supra*, 344 U. S. at 461, “Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief.”

A majority of the Court of Appeals rejected relator’s claim of inefficient representation by trial counsel. This being so, if the situation were as obvious as relator now contends it must have been equally obvious to his trial counsel.

⁹ But see petition April 2, 1951.

"This is not the case of an accused who has been denied counsel and who has failed to assert his constitutional rights at the proper time because of ignorance, but of one who has had the assistance of able counsel who knew how to raise and would have raised upon the original trial the questions that he is now raising, if there had been any substance to them." *Crowe v. United States*, 4 Cir. 1949, 175 F. 2d 799 at 801.

"The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States, 28 U. S. C. §2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal: To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." Mr. Justice Reed, *Brown v. Allen*, *supra*, 344 U. S. at 485.

"If defenses may be omitted at trials, rights of review omitted, and yet availed of through habeas corpus, the whole course of criminal justice will be deranged and, it may be, defeated." *Ex parte Spencer*, 228 U. S. 652 at 661, and see in *re Wood*, 140 U. S. 278 at 290.

"Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered." *Brown v. Allen*, *supra*, 344 U. S. at 480, footnote 24.

Mr. Justice Reed, "Failure to appeal is much like a failure to raise a known and existing question of unconstitutionality proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection

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to conviction on those grounds." *Id.* at 486, and see *Id.* 487. " * * * Failure to use a state's available remedy, in the absence of some interference or incapacity * * * bars federal habeas corpus."

As to the "broad reach" given to federal habeas corpus by recent cases, see Mr. Justice Jackson in *Brown v. Allen*, supra, 344 U. S. at 532, 533. "Once upon a time the writ could not be substituted for appeal or other reviewing process but challenged only legal competence or jurisdiction of the committing court. We have so departed from this principle that the profession now believes that the issues we actually consider on a federal prisoner's habeas corpus are substantially the same as would be considered on appeal." *Id.* at 540.

"Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restrictions by the state should be respected by federal courts." *Id.* 541.

As to the scope of review and possible relief on habeas corpus generally, see *Commonwealth, ex rel., Elliott v. Baldi*, 373 Pa. 489, supra at 492, 495; *Commonwealth, ex rel., Carey v. Prison Keeper*, 370 Pa. 604; *Commonwealth, ex rel., McGlinn v. Smith*, 344 Pa. 41, 24 A. 2d 1. See and cf. *Woods v. Nierstheimer*, 328 U. S. 211, 66 S. Ct. 996, 90 L. Ed. 1177; *Dowd v. United States*, 340 U. S. 206, 71 S. Ct. 262, 95 L. Ed. 215; *Bowen v. Johnston*, 306 U. S. 19 at 23, 24, 59 S. Ct. 442, 83 L. Ed. 455; finally, *Waley v. Johnston*, 316 U. S. 101, 104-105, 62 S. Ct. 964, 86 L. Ed. 1302.

Mr. Justice Frankfurter, *Brown v. Allen*, supra, 344 U. S. at 503, "Of course, nothing we have said suggests that the

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federal habeas corpus jurisdiction can displace a state's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal Constitution may be waived at the trial. *Adams v. United States, ex rel. McCann*, 317 U. S. 269, and may likewise be waived by failure to assert such errors on appeal. Cf. *Frank v. Mangum*, 237 U. S. 309, 343."

"When a state insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus * * * However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding (italics supplied) as in *Moore v. Dempsey*, 261 U. S. 86; cf. *Ex parte Lange*, 18 Wall 163; *Ex parte Royall*, 117 U. S. 241." *Id.* at 503. Is this such a case?

In view of the mandate we of necessity deferred answering this question until relator was afforded an opportunity to present evidence in support of his allegations. The burden of proving facts inconsistent with judicial records in all proceedings of this kind is heavy. *Brown v. Allen*, supra, 344 U. S. at 507. Petitioner must "allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that * * * the state so departed from constitutional requirements as to justify * * * intervention to protect the rights of the accused." *Darr v. Burford*, supra, 339 U. S. at 218; *Johnson v. Zerbst*, 304 U. S. 458 at 463; *Hawk v. Olson*, 326 U. S. 271 at 279.

A hearing was held with relator present on March 11, 12, 13, 16, 17, 18, 19 and 20, 1954. Relator called 22 witnesses and offered 137 exhibits; respondent 11 witnesses, 6 ex-

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hibits. In addition we have before us the record of proceedings in the state and federal courts.¹⁰

Although afforded opportunity by the court to testify relator declined to do so. N. T.-H. 614-617. Next day relator's counsel took exception to the questions propounded by the court, alleging relator was compelled to make statements he was not required to make by the United States Constitution. See *Id.* 723, 725. The exception is without merit. A habeas corpus hearing is not a criminal proceeding. See *United States, ex rel., Sholter v. Claudy*; 3 Cir. 1953, 203 F. 2d 805, 806; 807.

About 11:25 P. M., December 22, 1947, David Darcy, 22, Harold Foster, 23, Harry Zeitz, 18, and Felix Capone, 16, arrived at the Feasterville Tavern located at the junction of Churchville-Newtown-Bustleton Roads, in the Village of Feasterville, Lower Southampton Township, Bucks County, Pennsylvania.¹¹ Darcy, Foster and Zeitz, each armed with a revolver,¹² entered the tavern while Capone acted as a "lookout" in an automobile parked nearby with the engine

¹⁰ May 28, 1954, petition by relator to reopen hearing to clarify some evidence. June 12, respondent moved to dismiss. June 28, after relator's counsel did not appear at the hearing, opportunity was afforded to file affidavits. See 28 U. S. C. A., §2246; *United States, ex rel., Darcy v. Handy*, supra, 203 F. 2d at 429. After the testimony was filed October 8, 1954, and examined together with the affidavits and the law, the petition to reopen was denied November 10, 1954. See note 30, *infra*, and see *United States v. Willis*, 3 Cir. Slip Opinion, Jan. 4, 1955. December 3, 1954, was set as the time for argument, findings of fact and conclusions of law. November 26, 1954, counsel for relator's oral motion for continuance was denied.

¹¹ They left Philadelphia (Frankford section) about 10:30 in a two-door 1939 Plymouth sedan owned and driven by Zeitz. N. T.-T. pp. 815-816.

¹² 32.20 French mfr.; 32 caliber, Richardson & Harrington; 38 caliber, Smith & Wesson, used on all holdups, stolen by Capone from his home. N. T.-T. 824. *Id.* 746, 847-848.

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running for a quick getaway. During the course of the robbery Darcy fired two shots and then engaged in a scuffle with Allen Hellerman and Edward Wunsch. During the scuffle Darcy, Zeitz and Foster fired shots. Hellerman fell to the floor, shot in the base of the neck and paralyzed in both lower extremities.¹³ Two shots struck Wunsch causing arm and shoulder injuries. After taking the money from the cash register, Foster demanded that everyone produce their wallets. Darcy said he felt "like shooting someone", and again, "Where is the police? I feel like shooting some of them." N. T.-T. 304. Darcy then threatened several patrons with his gun, lined them up against the wall with their hands up and demanded their watches. While Foster was "covering" those present, Darcy and Zeitz reloaded their guns. After robbing the proprietor and some 18 patrons, with Hellerman lying on the floor "apparently dead" they fired shots into the mouthpiece of the telephone, warned those present not to move for a long time, and departed, Foster returning momentarily as a warning and to wish them all a "Merry Christmas."

Meanwhile, a Mrs. Leutwyler got out a rear door, ran across the road to the Buck Hotel and gave the alarm. At the hotel she found the bartender and two other persons, William Kelly and Frank J. Walter. They followed her outside and stood at the road intersection. While there Horace Patterson, a friend of Kelly, drove out of Churchville Road and stopped to talk with him and Walter. They noticed the automobile, with the engine running, standing in front of the Feasterville Tavern headed toward Newtown. Darcy, Foster and Zeitz ran from the tavern, got into the car and started off with Zeitz at the wheel. Just then,

¹³ N. T.-T. 726. Critically ill for sometime; appeared as a Commonwealth witness in a wheelchair; since deceased. N. T.-H 895.

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one of Zeitz' companions said: "Someone is coming out the door." Zeitz fired two shots, from a gun held in his left hand, from the front window of the driver's side in the direction of Kelly who was then some ten or twenty feet away. One of the bullets struck Kelly in the back of the head causing his death within two days.

A half hour after Zeitz fired the shots, Darcy and his three companions committed another armed robbery of the proprietor and three or four patrons of the Deacon Inn near Penndel, eight miles away from the Feasterville Tavern. Darcy said, "Stop the fooling around. This is a stickup. We just killed a couple of guys." N. T.-T. 685. Capone, with gun in hand, said, "You guys ought to try this sometime, it's fun." N. T.-T. 688. Three shots were fired, two of them into the telephone booth; no one was injured. Upon their return to Philadelphia at 1:17 A. M. December 23, 1947, they were apprehended by Philadelphia police.¹⁴

That same day all four made a statement to the police voluntarily admitting their participation in the Feasterville Tavern and Deacon Inn robberies (CX-69, N. T.-T. 814), and statements as to having committed seven other robberies since November 30, 1947, using the same automobile and guns and a plan, pattern and scheme similar to that used on December 22, 1947—three in New Jersey, four in the Bucks-Philadelphia Counties area.¹⁵ Altogether seven

¹⁴ See and cf. Doylestown Daily Intelligencer. Rel. Ex. 12 and 13. Newtown Enterprise, January 1, 1948. Ex. 107, 108.

¹⁵ (a) November 30, 1947, 2:55 A. M., Ralph & Jim's Cafe, Waterford, N. J. Darcy and Zeitz fired two shots into the floor. Capone was unarmed. N. T.-T. 341; see Com. Ex. CX-71. (b) December 3, 1947, 11:15 P. M., Mary's Tavern, Maple Shade, N. J. Darcy, Foster and Capone entered armed; Zeitz acted as "lookout". N. T.-T. 846. Com. Ex. CX-71. (c) December 3, 1947, 1:50 A. M., Old Coin Inn, Hammonton, N. J. Foster, Zeitz and Capone armed; Zeitz fired one shot and pulled telephone receiver from the wall. N. T. Foster-Zeitz

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patrons were shot or otherwise injured.¹⁶

Because of Kelly's death on Wednesday, December 24, all four were held without bail December 26 by Magistrate William Hogan in Philadelphia. Meanwhile their transfer to the Bucks County authorities was delayed by weather conditions. At the hearing Lt. John Hanlon of the Philadelphia police testified as to their admissions.¹⁷

Monday, January 5, 1948, all four were brought to Bucks County, charged with murder and committed without bail by Justice of the Peace Horace A. Cooper at Langhorne to the Bucks County prison to await action by the Grand Jury February 9, 1948. The Commonwealth was represented by

trial, p. 1221. Com. Ex. CX-71. (d) December 6, 1947, 1:50 A. M., Bell's Corner Tavern, 8300 Bustleton Avenue, Rhawnhurst, Pa. Foster and Zeitz entered armed; Capone acted as "lookout". During scuffle three patrons, Arthur Coffin, a city fireman, was shot through the chest and abdomen, George Klinger shot through the right leg, and Walter Watten suffered a gashed hand trying to grab one of the guns. Hurrying to make a getaway, the attempted robbery was frustrated. N. T. Foster-Zeitz trial, p. 1239, Com. Ex. CX-74 (e) December 9, 1947, Poplars Inn, Lincoln Highway. Zeitz and Capone remained in car; Foster entered armed; only one person being present in the inn. N. T. Foster-Zeitz trial, p. 1226. Com. Ex. CX-72. (f) December 13, 1947, 1:00 A. M., Wolf's Tap Room, Elkins Park, Pa. Darcy, Foster and Capone armed. Darcy scuffled with a patron, his gun went off; the man was injured. Capone fired three shots into the wall. N. T.-T. 849, Com. Ex. CX-73. (g) December 17, 1947, 1:50 A. M., Pulokas Inn, McDade Blvd., Woodlynn, Pa. Zeitz and Foster entered armed; Capone acted as "lookout". Zeitz fired one shot into the ceiling. N. T. Foster-Zeitz trial, p. 1212, Com. Ex. CX-70. The Commonwealth agreed that Capone's statement in CX-71 about being picked up in New Jersey with a stolen car did not involve Darcy. It was eliminated in the Darcy trial and the jury so instructed. N. T.-T. 857.

¹⁶ Darcy participated in the Feasterville and Deacon Inn and three of the other seven robberies. See Note 15 (a), (b), (f). Only Exs. 69, 73 and part of 71 were received at his trial. Upon objection by defense counsel part of Ex. 71 was excluded with cautionary instructions. N. T.-T. 845-846. See and cf. Rel. Ex. 14, 15.

¹⁷ See and cf. Rel. Ex. Nos. 16 and 17, 18 and 19, 21.

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Assistant District Attorney Willard Curtin; Zeitz by I. Louis Rubin, Esq. Coroner's physician Dr. John C. Simpson testified as to the cause of death; Chief County Detective Anthony Russo as to signed statements by the defendants. The possible penalty was not mentioned.¹⁸

Tuesday, January 27, 1948, a coroner's inquest, upon hearing testimony of Dr. John C. Simpson, coroner's physician, decided that death was caused by a gun shot wound; Pvt. Kenneth R. Dane, Pennsylvania State Police, testified that Zeitz admitted firing two shots in Kelly's direction. The possible penalty was not mentioned.¹⁹

January 29, 1948, transcript filed, Clerk of the Courts office, Ex. Nos. 1 and 4; Rel. Ex. No. 10, Oyer and Terminer Criminal Docket, p. 320; Ex. No. 115 Criminal Minutes, Docket 1948 to —, p. 7; Ex. No. 137, Criminal Minutes, Docket 1943 to —, p. 379.

February 6, 1948, the District Attorney was reported as stating that the murder case was scheduled for action by the Grand Jury February 9, 1948, but the trial would in all probability be continued until the May term.²⁰

February 10, 1948, defendants being present (Zeitz represented by I. Louis Rubin, Esq., Darcy by Webster S. Achey, Esq., Capone by Frederick Smith, Esq.) Judge Keller charged the Grand Jury for ten minutes and approved submitting the case to the Grand Jury for action.²¹ Six witnesses appeared. 10:55 A. M. all four defendants were jointly indicted to No. 37 February Session's 1948 for murder. Rel. Ex. No. 2.

¹⁸ See and cf. Rel. Ex. Nos. 23 and 24.

¹⁹ See and cf. Rel. Ex. Nos. 28 and 29.

²⁰ See and cf. Rel. Ex. Nos. 34 and 35.

²¹ Ex. No. 10, p. 314. See and cf. Rel. Ex. Nos. 36 and 37.

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The District Attorney then moved for a continuance until the May Term because of the critical condition of Allen Hellerman (a Commonwealth witness) and because Harold Foster was without counsel. The continuance was granted. Rel. Ex. Nos. 116, 12., p. 379.

March 1, 1948, Webster S. Achey, Esq., on Darcy's behalf and Frederick Smith, Esq., for Capone, moved for a severance and separate trials.²² It was reported²³ that the court commented "Separate trials * * * will mean that it may take a year to dispose of the cases", and suggested to counsel the advisability of a combination trial as to all defendants, but counsel insisted on their legal rights. Judge Keller granted the motions. Rel. Ex. Nos. 1, 4, 10, p. 320.

March 3, 1948, Judge Boyer appointed Donald B. Smith, Esq. and William Freed, Esq., as counsel for Harold Foster.²⁴ Rel. Ex. No. 10, p. 321. Id. Ex. Nos. 1 and 4. Id. Ex. No. 45.

There were only two attorneys in the District Attorney's office in Bucks County at that time, Edward G. Biester, and his assistant, Willard S. Curtin. While both were engaged in murder cases other cases could not be disposed of without difficulty. The murder cases had already been continued from the February term. Allen Hellerman, a witness, was in serious physical condition. The District Attorney decided in the interests of Justice²⁵ that the cases

²² Act March 31, 1860, P. L. 427 §. (Pa.) 19 P. S. §785.

²³ Rel. Ex. Nos. 43 and 44.

²⁴ Act March 22, 1907, P. L. 31 §1, as amended April 6, 1949, P. L. 406, §1, Pa. 19 P. S. §784. See *Commonwealth v. Thompson*, supra, 367 Pa. 102. Rel. Ex. No. 45.

²⁵ See Act March 31, P. L. 427, §54 (Pa.) 19 P. S. §781, "Two Term Rule". " * * * Unless the delay happen on the application or with the assent of the defendant * * *." Pa. Constitution, Art. 1, §9, " * * * a speedy public trial by an impartial jury of the vicinage, * * *". Cf. p. 11, supra.

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should be tried as promptly as possible.

At a conference in early March 1948 defense counsel were advised that the Foster-Zeitz case would be called first for trial; the Darcy case the following week; then Capone. May 17, 1948, the Capone case was continued;²⁶ the trial list prepared for the May term and counsel for Darcy again notified that the Darcy case would be called for trial the week following the Foster-Zeitz trial which was first on the list; the precise date of commencing the Darcy trial depending upon the date of completion of the Foster-Zeitz trial.²⁷ Subpoenas for the Darcy trial were sent out the end of the week of May 24 or early in the week of June 1.

April 12, 1948, a venire was ordered, Rel. Ex. No. 8, for the empaneling and summoning of 120 jurors for service "At the term * * * commencing on the 17 day of May * * * 1948 * * * to serve for the week term (sic) thereof commencing on the 24 day of May * * * 1948". Simultaneously Rel. Ex. No. 9 called for 120 " * * * to serve for the week term (sic) * * * commencing on the 1 day of June 1948". On the

²⁶ Rel. Ex. No. 10, p. 327, continued February 12, May 17. Arraigned and plead guilty September 29, Frederick Smith, Esq., Edward Kelly, Esq., Philadelphia, for defendant. Received testimony of Foster-Zeitz trial, Commonwealth's witnesses, defendant's witnesses. Case continued (see Rel. Ex. Nos. 10, 115, p. 50). Argument court, February 9, 1949, case continued on account of illness of Edward H. Kelly, Esq.; April 11, 1949, case continued from June 3, 1949, to June 17, 1949. Ex. No. 10, p. 449, Hon. Fred W. Davis, 43rd Judicial District, specially assigned. June 17, 1949, Commonwealth's witnesses, defendant's witnesses, and argument. September 6, 1949, defendant guilty of murder first degree, imprisonment for life. September 7, 1949, sentence.

²⁷ See and cf. Rel. Ex. Nos. 51, 52, May 14, 1948, " * * * only two will be tried during the approaching term * * * Darcy and * * * Capone will be tried later." Ex. Nos. 55 and 56, May 24, 1948, "Only two of the defendants charged with the murder will go on trial this term * * * The other two defendants * * * will be tried at a later term of court." But see Rel. Ex. No. 64, May 28, "at a later date"; No. 65, May 29, "tried later"; Capone, Rel. Ex. Nos. 70, 91, 99, "not until September".

return of the writ the sheriff certified, Rel. Ex. Nos. 6 and 7, that the persons named were summoned to appear in court at 9:45 A. M. on May 24 and June 1, respectively.²⁸ Ordinarily the jurors, unless previously excused by Judge Keller, would report on the date directed. However, when it became apparent that the Foster-Zeitz trial would continue into the week of June 1, the court directed the sheriff's office to notify verbally all who had been summoned for jury duty as of Tuesday, June 1, 1948, not to appear until Monday, June 7, 1948. They were so notified and did not appear for duty until June 7 as directed.^{29, 30}

²⁸ See Rel. Ex. No. 137, p. 391-392, Foster-Zeitz panel, and see Rel. Ex. Nos. 53; 54 and 123a (Quakertown Free Press, May 27), Darcy (Id. 393) panel, Rel. Ex. No. 55 and see No. 123B.

²⁹ Members of the May 24 panel served during the week of June 1 (Rel. Ex. No. 10, p. 334, Ex. No. 137, p. 401)—June 2, 3, 4. No names in the Foster-Zeitz panel were included in the Darcy panel. Juror Wm. H. Slaughter, N. T.-T 218, a former night watchman at the Bucks County Home, acquainted with all the attorneys in the Darcy case, attended sessions "off and on" on several days of the Foster-Zeitz trial. There is no evidence that he was in court on June 1. He was excused from the Darcy case for cause. See colloquy N. T. p. 220 as to whether or not such presence per se was a disabling cause.

See and cf. Rel. Ex. No. 10, p. 331, "Eo Die—1948, June 1—Court called at Ten O'clock A. M. Hon. Hiram H. Keller, P. S. and Hon. Calvin S. Boyer, J. presiding.

Eo Die—List of Traverse Jurors Summoned and Returned by the Sheriff to the May Term of Criminal Court A. D. 1948 (second week) * * *

Id. at 332, "Eo Die—The Second Week Traverse Jurors Having Been Called, All Answered to Their Names But the Following * * * See Rel. Ex. No. 137, p. 393, Ex. No. 9 is spelled out, then "1948 June 1—List of Traverse Jurors Summoned by the Sheriff and Returned to May Term of Criminal Court A. D. 1948." Id. at 394, "List of Traverse Jurors That Were Excused From the May Term of Criminal Court A. D. 1948".

³⁰ Upon appearing in court the names on the Traverse Jury List were called and the jurors presence noted thereon (Foster-Zeitz Resp. Ex. No. 1, Darcy Resp. Ex. No. 2). They did not receive attendance cards. At the end of the jurors service the Traverse Jurors List was

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In each trial jurors waiting in the Grand Jury room were called individually into the main court room, carefully and searchingly examined on voir dire. In each trial a fair and impartial jury of twelve and two alternates was obtained.³¹ It took more time to select a jury in the Foster-Zeitz case; each defendant had twenty peremptory challenges;³² each a separate independent examination; two extra venires were called.^{33, 34} Foster and Zeitz each exercised sixteen

certified, together with an individual voucher for each juror (Foster-Zeitz Resp. Ex. No. 3(a), et seq., Darcy Resp. Ex. No. 4 (a), et seq.) by the Clerk of Courts to the Controller. The latter paid each juror upon each juror signing an individual receipt therefor (Foster-Zeitz Resp. Ex. No. 1, Darcy Resp. Ex. No. 1). The Traverse Jury List and the individual jurors vouchers show only the number of days not the dates served. In view of the foregoing there was no necessity for reopening the hearing to obtain additional evidence as requested by relator.

³¹ (1) In the Darcy case: Wm. P. Pardoe, Yardley, Trenton, N. J., foreman; (2) Mrs. Anna Bucher, Newtown, housewife; (3) Marvin D. Weidner, Telford, clerk; (4) Jesse H. Horne, Quakertown, farmer; (5) Oliver C. Landis, Perkasio, farmer; (6) Franklin T. Fretz, Perkasio, salesman; (7) Roger Mason, Perkasio, farmer; (8) Howard Price, Doylestown, farmer; (9) L. Calvin Fluck, Quakertown, hosiery knitter; (10) Mrs. Elva A. Shive, Dublin, housewife; (11) Mrs. Ruth G. Bliss, Doylestown, housewife; (12) Mrs. Ann L. Reed, Penns. Park, housewife. Alternates: (1) Wm. F. Hickey, Morrisville, Tel. Constn. Supt.; (2) Mrs. Virginia Brillman, Point Pleasant, housewife.

³² Two extra in selecting alternates. N. T. Foster-Zeitz 527. Before being sworn juror No. 12 was excused for illness; replaced by another. N. T. Foster-Zeitz, 389.

³³ Foster-Zeitz: 11:00 A. M. May 24, to 2:55 P. M. May 27, N. T. 4 to 544, 120 summoned; 86 responded (2 non est; 2 deceased, 30 excused by Judge Keller—illness; physical defects, home conditions, etc.). After 66 were examined, 8 selected, May 25, 3:10 P. M., venire 50, N. T. 258. After 121 were examined, 11 selected, May 26, 4:00 P. M., venire 25, N. T. 455, Rel. Ex. No. 1, 10, p. 341, 344. Seven of the 25 were examined. 175 summoned; 143 examined. Neither Darcy or Capone names were mentioned.

³⁴ Darcy: 10:15 A. M. June 7, to 1:55 P. M. June 8, N. T. 2 to 270, 120 summoned; 81 responded (6 non est; 2 deceased; 31 excused, Id. Note 33, supra. Defense counsel objected to the number excused;

peremptory challenges; the Commonwealth thirteen, challenged for cause or excused were thirty-seven with conscientious scruples, seventeen for illness, physical defects, home conditions, etc., thirteen clients of counsel engaged in the trial, seventeen for fixed opinions or bias.³⁵

Darcy exercised only ten peremptory challenges; the Commonwealth eight. Challenged for cause or excused were twenty-five with conscientious scruples; nine for illness, physical defects, home conditions, etc.; one client;

but see *Com. v. Pasco*, 1938, 332 Pa. 439 at 444, 2 A. 2d 736. When the Commonwealth requested alternates, Mr. Achey, at sidebar, stated he intended to move for a change of venue if an extra venire was required, the Darcy case being the second case under a single indictment, but see *Com. v. Riggs*, 1934, 313 Pa. 457, 169 A. 396. The occasion did not arise.

³⁵ Four knew Kelly: No. 9 worked with him, followed the case; No. 41 read the Newtown, Doylestown and Philadelphia papers, and talked about it at work; No. 60 read the papers; No. 74 knew Kelly and some of the witnesses, read local and Philadelphia papers; 6 knew counsel; No. 64 Atty. Freed; No. 84 Atty. Smith, read about and discussed the occurrence; No. 126 Atty. Smith, his wife's counsel, read about it at the time and recently; No. 134 former client of Atty. Rubin, and read the papers; No. 109, District Attorney Biester, read about the occurrence; No. 125, the District Attorney and his assistant, Mr. Curtin, read about and discussed the case. Three read the Philadelphia Evening Bulletin, No. 78, No. 119, No. 128; the latter the Quakertown Free Press. One read the Philadelphia and the local papers, No. 110. Two read "the papers", (No. 82) and discussed it (No. 141). One read the Doylestown Daily Intelligencer at the time (No. 69). But quare No. 69, No. 82, No. 119, No. 134.

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fourteen for fixed opinions or bias.^{36, 37, 38}

³⁶ No. 43 knew Kelly's brother, visited the Feasterville Tavern, read the papers, but said his opinion might be changed; No. 69 lived near the Feasterville Tavern, knew the owner, proprietor, and some of the witnesses in the case; No. 35 knew the Beacon Inn proprietor, read about and discussed the case; No. 29, juror Westlake (see Note 37 *infra*) read or heard about the case; No. 62, juror Slaughter read about the case, attended some session of the Foster-Zeitz trial "off and on"; no opinion; No. 5's wife worked in Mr. Biester's law office, read the papers and discussed the case; No. 65 read about the case; No. 67 read some, "mind-set"; No. 75 read papers and discussed case; No. 19 read about the trial in the Doylestown Daily Intelligencer; no opinion in the Darcy case, scruples; No. 25 read "more or less"; "I think I have an opinion", "some scruples"; No. 39 faulty hearing, read about case; No. 45 discussed case; No. 54 read about and discussed case; drove truck for Philadelphia Inquirer; No. 5, No. 19, No. 45 were challenged by the Commonwealth; No. 39, No. 62 were excused by agreement. Quære as to No. 19, No. 25, No. 39, No. 54, No. 62.

³⁷ After three jurors were selected, not sworn, Mr. Achey questioned juror Westlake as follows: Q. "Have you formed any opinion as to the guilt or innocence of this defendant, David Darcy?" A. "Well, I think—yes, I have. It is one of the most cold-blooded murders I have heard of." Mr. Achey: "If your honor please, I ask—" The Court: "That will be stricken out." Mr. Achey: "I object to that answer. It was uncalled for." The Court: "Objection sustained. Do not venture any opinion. Just answer the questions in the way they are asked of you." Mr. Achey: "I would also ask for a mistrial by reason of that statement." Court: "Motion denied." Mr. Achey: "Exception." Court: "Yes, the jurors already selected will totally disregard that remark or answer made by that juror." Mr. Achey: "May I ask that this juror be dismissed." Court: "He will be discharged for cause." N. T.-T 97, see Rel. Ex. No. 82, and see *Com. v. Dreamer*, 1936, 324 Pa. 226 at 222-223, 188 A. 11. Next morning at sidebar, the District Attorney moved that the 8 then selected be excused to avoid any other such incident. Upon Mr. Achey's objection the motion was not pressed. N. T. 189-190, and see *voir dire*, juror No. 34, Mrs. Rosenberger, and juror No. 37, Harold Lake.

³⁸ See and cf. Rel. Ex. No. 59, May 26, "conscripted"; Rel. Ex. No. 61, Id. May 27, " * * * searching for jurors * * * willing to serve if accepted." Rel. Ex. No. 74, Id. June 3, "The Gossiper", " * * * flurry of dodging", citing reasons. Id. loss of wages, business engagements, dislike serving on murder jury. Id. "never sat that long".

Rel. Ex. Nos. 80, 81, June 7, " * * * long ordeal * * * drawing * * * jury * * * great difficulty * * * " Rel. Ex. No. 82, June 8, "Less trouble than * * * Zeitz and Foster * * * " Rel. Ex. No. 111, June 10, "While many * * * thought * * * jury * * * difficult to secure * * * took less time than * * * last week."

Once accepted the jurors were kept together, during the trial, under the watchful care and supervision of court officials (in Foster-Zeitz 3, in Darcy 4 uniformed tipstaves). The jurors were not permitted to see any newspapers, hear any radio, or see any television program. They were kept free from any outside influence or contact.

At no time during the trial was there any need to call for order.³⁹ There were no outbursts, no disturbances, no

³⁹ But see Rel. Ex. No. 76, June 4, "The grief stricken mother of * * * Zeitz, collapsed in court Thursday afternoon just before her son's attorney * * * started his address to the jury. She was rushed to the * * * hospital after (a) doctor * * * was called to the court room.

A few minutes later, Mrs. Ethel Foster * * * also received medical attention from court attendants. When she became ill * * * Zeitz jumped to his feet and tried to get to his mother's side, but was held back by State Troopers.

Judge Boyer directed that the defendants be removed from the court room until the dramatics were over." Incidents not reported in N. T. 1298, 1299. Rel. Ex. No. 88, June 10. Darcy's mother collapsed in the corridor; court officers summoned a physician. *Id.* Judge Keller commented on the actions of a number of young girls defacing the newly painted walls of the ladies' room while attending court. Rel. Ex. No. 136, "Front Page Detective", Vol. 12, No. 2, June 1948. Copyright 1948 (Dell Pub. Co., Inc.) 73 pages, 15c—contained as the 12th of 14 stories, "Kill Crazy! * * * Could they be stopped short of murder?" by John Keith. Across pages 34 and 35 a picture posed by models carried a legend substantially factual as to Hellerman's plight December 22; pp. 34, 36, 37 interspersed with pictures (p. 36 Feasterville Inn, police, p. 37 police with three of the defendants—not Capone—at their preliminary hearing) first tells of the Bell's Corner Tavern incident, of the efforts of the police to capture defendants before anyone was killed; parts of pp. 70, 71 and 72 relate incidents on December 22; finally, "The case against them is being prepared, and the men will be brought to trial following indictment by the Bucks County Grand Jury." The defendant's brother and sister each testified that on occasion there were some copies of the magazine in the court room, once while the trial was in progress, 3 copies; another during the noon recess, 15 copies. If there were any such magazines in the court room they were concealed from the eyes of the court room attendants and did not under any circumstances come to the attention of the District Attorney, his assistant, the court, or the jury. See N. T. 539-546, 550-557, 571-573, 582, 586. And see Resp. Ex. No. 5, par. 17, 18, no extra police precautions.

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untoward incidents either in or outside the court room, in Doylestown, or elsewhere throughout the county.⁴⁰ None

⁴⁰ Relator called seven witnesses who heard remarks between December 22 and June 15, to prove the feeling of people in general toward the defendants, contending that this evidence and other circumstances amounted to a state of hysteria and prejudice and that the feeling grew in intensity, reaching its climax at the Darcy trial. The evidence supports no such contention. (a) Rev. A. Damrosch, St. Paul's Episcopal Church, Doylestown, acquainted with Harold Zeitz; remarks principally by members of his parish. (b) Rev. Wm. Babinsky, Reformed Church of America, Feasterville ("roughly fifteen miles from Doylestown"; pop. about 1500; church membership "roughly 150"; regular attendance "difficult * * * to remember * * * perhaps 100"; knew Kelly and officiated at his burial service), as to conversation in the Feasterville area. (c) Cole Farrier—attorney for Harold Zeitz (not of record during the trial—Attorney Rubin engaged for that purpose) prepared and argued appeal before the Supreme Court of Pennsylvania and application before the Pennsylvania Board of Pardons; counsel for some patrons robbed in the Feasterville Inn; member of the Society of Friends and opposed to capital punishment—as to the Feasterville area and commuters on the morning Philadelphia train. (d) Dr. Carl J. Hoffman—examined Darcy in 1950 and wrote a letter on his behalf to the Governor of Pennsylvania—as to remarks in Feasterville, Newtown and Richboro. (e) Howard R. Price, a friend of Darcy's sister, who resided in Andalusia in the S. E. tip of Bucks County but as a salesman of automobile parts made monthly calls in Bristol, Doylestown and Sellersville. (f) Leicester Knickerbacker Davis—a photographer who came to Doylestown December 13, 1947, after an absence of 22 years—approached and questioned perhaps 100 to 150 people in the Doylestown area to ascertain their reaction to the crime to provide background material to write an "early American naval novel * * * probably evolving into a book on the responsibility of society as regards youthful crime," (N. T. H. 417). (g) Mrs. A. Patterson, Zeitz' aunt and (h) Mrs. Inez Darcy Heckman, Darcy's sister, as to remarks in Doylestown. Generally the witnesses could not recall any particular person or the time or place of any particular remark, or exactly what they heard in context.

The several witnesses testified: (a) The feeling then and now was one of " * * * indignation * * * antagonism towards the defendants and a general feeling that they all were guilty". (b) talked with 100 people during that time; "the prevailing sentiment of the community * * * bias in favor of condemning the defendants * * * some said they don't need a trial * * * they should be condemned to death * * * shouldn't have any mercy * * *". "There were no expressions of threats of violence in the sense that anybody was going to organize against the defendants * * * people said they ought to be hanged * * * shot

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* * * get the chair * * * one said they ought to be stamped out like bugs." There were at no time any disturbances or other unusual incidents. (c) talked to about 50 people; saw about two copies of the local newspaper; heard some radio comments; one of the patrons of the Feasterville Inn thought Zeitz ought to burn because he fired the shot. Some people were displeased because he was representing Zeitz and let him know it; others asked when the defendants were going to burn; some fawning—some serious; notwithstanding this, the witness raised no such question on the Zeitz appeal. (d) "They ought to be hanged * * * get the chair * * * why bother with them * * *" The idea of " * * * gangsters * * * coming into Bucks County doing these crimes * * * should have stayed in Philadelphia * * * should be no mercy * * * we should throw them out." (e) " * * * they had no place there * * * they should be given Bucks County justice." Once in the spring in a store in Sellersville and again at a gas station in Andalusia he heard " * * * if they had anything to do with it they would see that the boys were lynched * * *" At other times he heard the word "hang", "shot". We rejected Ex. No. 117 offered to refute any idea of fabrication of the witness' testimony because the words used in court were not contained therein—the letter contained a series of conclusions; Mrs. Price was not in court and we had grave doubts that the witness was the author of that letter. (f) "People were shocked", "We * * * are not a lynching community * * * a large percentage (50—60—70) of the people I talked with were outraged and they thought there should be very drastic punishment meted out * * *" "Criminals cannot come into Bucks County and commit crimes * * *" Some " * * * hope they would get the hot seat * * * some wild talk * * * like to see them taken out and shot * * * strung up * * *" (g) Heard a maid say, " * * * just like a carnival", "they haven't got a chance * * * because they hate Philadelphia boys and they are very, very bitter * * * they're going to burn for it." A man said "all cut and dried * * * before it starts." Outside the court house some men said they were going to see the execution. Quaere, an emotional witness whose testimony we did not believe either in this or other particulars (e. g., as to an alleged remark by the District Attorney, one by Judge Boyer and another by school children). (h) In January and in the spring heard some man say at lunch in the Doylestown Inn "they shouldn't go to all that bother * * * they don't deserve a trial * * * they should be strung up." In one of the court house offices during lunch time, during the Darcy trial, heard someone say, " * * * He doesn't stand a chance either"; " * * * He's going to get it too."

N. B. (a) Attended one session of the Foster-Zeitz, not the Darcy trial; (b) One day at the Foster-Zeitz, not the Darcy trial; (g) Second week of the Foster-Zeitz, not the Darcy trial; (h) Darcy trial, not Foster-Zeitz; (f) Not remember the Darcy trial as well as the Foster-Zeitz; (c)(d)(e) Not at either trial.

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from December 22, 1947, down to or after the trial. At no time during either trial was the court room filled to capacity.⁴¹ The attendance at the Foster-Zeitz was larger than at the Darcy trial.⁴² The proceedings were reported in the

* Philadelphia Public Ledger, discontinued about 1935, connected with Society Prevention of Cruelty to Animals; July 1944, security clearance by Fourth Naval District to visit naval establishments, Rel. Ex. 131; March 1945, Lieutenant temporary Coast Guard, public relations liaison officer, 4th Naval Dist. to serve without pay, Rel. Ex. 130; claimed to be a "war correspondent" but quære, he was never outside continental United States. Apparently on occasion visited United States Army camps, see Rel. Ex. 127; Collier's April 1945, a two page picture story about the training of G. I. War Dogs, Rel. Ex. 128; Collier's, September 1941, witness given credit for four pictures interspersed in a two-page story written in a light humorous vein by one G. W. about army camps, Rel. Ex. 125; November 1940, two page picture story, "People and Places" on police cars in Philadelphia, no by-line, Rel. Ex. 129; Commonwealth Magazine, four page picture story of Bucks County; civil defense work, Bucks County and Borough of New Hope during a four month period, Rel. Ex. 132, 133, 134.

⁴¹ See certificate Keller, P. J., "16. The trial was held in the main court room with seating capacity of approximately five hundred persons. The attendance at the Darcy trial was surprisingly small, in number, and at no time throughout the trial was the court room more than partially filled." The attendance was never more than 300; rarely over 200; during the voir dire examination only 50 to 60 persons.

⁴² Foster-Zeitz: Rel. Ex. No. 58, May 25, Judge explained voir dire procedure to 200 high school students attending trial; Rel. Ex. No. 70, June 2, night session attended by several hundred spectators; Rel. Ex. No. 74, June 4, "So great is the interest * * * that an extremely large number of spectators crowded into the court room yesterday". Rel. Ex. No. 78, June 5, "more than three-quarters filled" when verdict rendered.

Darcy: Rel. Ex. No. 88, June 10, evidence "much the same"; Rel. Ex. No. 111, June 10, Newtown Enterprise, Id.; Rel. Ex. No. 91, June 11, Id.; Rel. Ex. No. 95, June 12, by agreement of counsel, only the statements implicating Darcy were introduced; Rel. Ex. No. 88, June 10, girls present; Rel. Ex. No. 92, June 11, " * * * at least 200 spectators" this morning "many of them young folks". Rel. Ex. No. 97, June 12, considerably more young girls than boys—some youngsters not five years old.

daily press⁴³ and, on occasion, on the radio.⁴⁴ The reporting

⁴³ Foster-Zeitz trial: **Doylestown Daily Intelligencer**, daily ex. Sun. for 125 years [Doylestown Borough, County seat, laid out 1778, pop. 1950—5262, 1940—4976 (Twp. 2364—1471)] Cir. Oct. 7, 1947—5297; Oct. 6, 1948—5329; N. T.-H. 226-227, 231, primarily in center of county—Doylestown, Newtown and parts of Montgomery Valley, N. T. 194, Rel. Ex. No. 55, May 24 to No. 78 June 5. **Bristol Daily Courier**, daily ex. Sun. [Bristol Borough, pop. 12,710—11,895 (Twp. 12,184—5,857)] common ownership with Doylestown Daily Intelligencer; file copies being microfilmed, not produced; same coverage with more moderate makeup, space allocation, headlines and editorial policy. N. T.-H. 368-369, 370-373. Cir. Sept. 30, 1948—5397, N. T.-H. 370-372, eastern and lower Bucks County—Morrisville, Pennel, Bristol Twp., Bensalem Twp., mostly in Bristol Borough and surroundings. N. T.-H. 372. **Newtown Enterprise**, weekly Thur. [Newtown Borough, pop. 2095—2009 (Twp. 1013—816)] Cir. Oct. 7, 1948—1972, within five mile radius, N. T.-H. 255/259, Rel. Ex. Nos. 109, 110, June 3; Rel. Ex. No. 111, June 10. **Quakertown Free Press**, weekly Thur. [Quakertown Borough, pop. 5673—5150] Cir. not quite 5000, northern part of county, radius 25 miles, Rel. Ex. No. 123B, May 27, 123E, June 9.

Darcy trial: (a) Doylestown Daily Intelligencer, Rel. Ex. No. 89, June 7 to Rel. Ex. No. 102, June 15, Rel. Ex. Nos. 103, 104, 105, June 17, Rel. Ex. No. 106, June 19; Quakertown Free Press, Rel. Ex. Nos. 123F and 123G, June 17; and see Newtown Enterprise, Rel. Ex. No. 111, June 10.

Pre-trial, Foster-Zeitz and Darcy: Doylestown Daily Intelligencer, December, 6 issues, Rel. Ex. Nos. 12 to 22 incl.; January, 4 issues, Rel. Ex. Nos. 23 to 29 incl.; February, 6 issues, Rel. Ex. Nos. 30 to 41, incl.; March 1 and 3 (2 issues) Rel. Ex. Nos. 43 to 45 incl.; April 2, 3, 17 (3 issues), Rel. Ex. Nos. 46 to 48 incl.; May 7, 12, 14, 19 (4 issues) Rel. Ex. Nos. 49 to 54 incl.; Newtown Enterprise, Rel. Ex. Nos. 107, 108, Jan. 1, 1948.

Foster-Zeitz trial: Doylestown Daily Intelligencer, May 24, 25, 26, 27, 28, 29 (6 issues) Rel. Ex. Nos. 55 to 66 incl.; June 1, 2, 3, 4, 5 (5 issues) Rel. Ex. Nos. 67 to 79 incl.

Darcy trial: Id. June 7, 8, 9, 10, 11, 12, 14 (7 issues) Rel. Ex. Nos. 80 to 100 incl.; June 15, 17, 19 (3 issues) Rel. Ex. Nos. 101 to 106 incl.

The Doylestown Daily Intelligencer is published at 1:30 P. M. daily. N. T. 229. By noon June 8, 12 jurors had been selected; 2 alternates by 2:00 P. M.

(Population figures—Penna. Manual, Vol. 91, 1953-1954.)

⁴⁴ **Radio Station WBUS**, Doylestown; **WBUX**, Quakertown; each on the air for the first time May 20, 1948. Extent of coverage WBUS doubtful, N. T.-H. 272-273. Only evidence of WBUX coverage, see Quakertown Free Press, May 20, No. 123A, May 27, No. 123B, June 10, No. 123E. **WFIL Radio and Television, Philadelphia**, only evidence

was factual, with an occasional descriptive word or phrase, and, on occasion, words of compassion or commendation.⁴⁵

We found only one instance of editorializing in the news columns. The editorials were stimulating, thought-provok-

of coverage December 23, 1947, 15 to 22 seconds; January 21, 1948, 1½ to 2 minutes; radius of 50 miles; number of TV sets at that time limited. N: T-H. 267-272. See films, Rel. Ex. Nos. 112-113, and see Rel. Ex. No. 114, Philadelphia Inquirer, Jan. 21, 1948, Philadelphia Inquirer award to Arthur Coffin for frustrating attempted robbery at Bell's Corner Tavern, and to the two police officers for apprehending defendants.

Of 224 jurors examined on voir dire only one of the Foster-Zeitz, No. 142, only two of the Darcy panel, No. 7, and No. 41, heard pertinent radio comments.

⁴⁵ Rel. Ex. No. 65, "horror", "alleged trigger man"; Rel. Ex. No. 65, "trigger happy bandit", "wise-cracking", "hard boiled behavior"; Rel. Ex. No. 72, "sensational 30 day crime spree"; Rel. Ex. No. 109, "the sordid tale of thrill seeking youths * * *" which " * * * ended in murder", "wantonly".

Words of commendation: Rel. Ex. No. 36, February 10, " * * * impressed court officers and spectators as high school juniors * * *" Rel. Ex. No. 55, "Zeitz * * * wearing his military discharge button * * *" Rel. Ex. No. 72, June 3, Foster entitled to wear 14 naval battle stars; Zeitz served in the Army. Rel. Ex. No. 86, June 9, Darcy's father recently promoted to be assistant crier in Philadelphia courts.

Compassion: Rel. Ex. No. 23, January 5, "Zeitz * * / confessed to firing the shot that killed Kelly (although not intentionally) * * *" Rel. Ex. No. 57, May 25, many opposed to death penalty; Rel. Ex. No. 62, May 27, "two war veterans * * *"; other jurors with conscientious scruples. Rel. Ex. No. 71, June 2, and see Rel. Ex. No. 86, June 9, Capone cannot read or write, cf. Rel. Ex. No. 39, February 11. Rel. Ex. No. 75, June 4, Zeitz' parents and Foster's mother were not in court during charge. Rel. Ex. Nos. 73, 79, June 5, two young killers spend most of their time reading the Bible, cf. Rel. Ex. No. 87, June 9. But see Rel. Ex. No. 123E, "Zeitz * * * glanced almost defiantly at Judge * * * Boyer as he congratulated the jury * * *" State police thought Zeitz and Foster expected the worst from the start. Rel. Ex. Nos. 101, 102, June 15, "Darcy took it like a stoic * * * according to police * * * sensed the verdict several days ago"; Rel. Ex. No. 102, "I expected it". And see Rel. Ex. Nos. 123F and 123G, June 17.

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ing, instructive and fair comment. The newspaper policy

"To correctly appraise the editorial comments they must be viewed in their proper context. In the fall of 1947 two Philadelphia juries, predominantly women, found a 23 year old defendant, named Hallowell, guilty of murder in the first degree for the killing of two policemen in a gun battle but fixed the penalty at life imprisonment. Rel. Ex. 84, June 8, 1948. There were protests of "maudlin sympathy". A proposal by Judge Harry S. McDevitt that the duty to fix the penalty in first degree murder cases should be taken from the jury, contending that they "do not know how to exercise it", was referred to a legislative committee.

December 26, Rel. Ex. Nos. 16 and 17, reported "Bucks County now has a four-way murder case on its hands * * *" In an otherwise factual report written by an able conscientious reporter of 35 years experience, who covered the occurrence and the trials, an editorial comment read "Feeling Runs High, The general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the youthful bandits to trial, that it is a 'break' for society at large to have the trials in Bucks County rather than in Philadelphia."

December 27, Rel. Ex. 20, in "Fast Police Work", the editor after thanking the Bucks County and Philadelphia police for their speedy apprehension of the defendants declared, "What the public and police will be watching closely is what is done to these potential killers when they come before the bar of justice." Recalling one of Darcy's remarks during the Deacon Inn robbery, the editor wondered why policemen take so many chances with dangerous criminals, especially in view of the recent Philadelphia verdict. December 31, Rel. Ex. No. 22, "Errors of Jurors", discussed acquittals when there was ample evidence, the feasibility of having professional jurors; that judges sometimes do not rise to their responsibilities; such problems arise in cases of murder, drunken drivers, and in coroner's juries in highway death cases. The editor declared " * * * responsibility for miscarriage of justice does not rest alone with jurors * * * but in the courts and in the public's mind as it is expressed in antagonism to punishment for certain types of offenders." February 2, Rel. Ex. No. 31, "Who'll Be the Next?" discussed the problem of assaults by holdup men on the aged, on streets and in shops. Authorities and the public should insist that they receive impressive punishment to deter others from following their example. The editor declared, "If juries and courts will make examples of these cowardly enemies of society, there will be fewer of these assaults. It would be lamentable if citizens were forced to take the punishment * * * into their own hands." An INS news story February 6, Rel. Ex. No. 34, reported that the legislative committee chose to preserve the power of jurors, believing that a legislative proposal for separate findings by juries would result in more

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satisfactory verdicts. Id. No. 34 described the February Term of Court as one of the most important criminal sessions in a long time.

A Calstadt, N. J. truck driver was fined \$25 for attacking a married woman; some citizens, displeased with such a disposition, tarred and feathered the defendant. February 11, Rel. Ex. No. 38, under the title "Enraged Citizens", the editor declared that "Mob law is not the kind we want in this country * * * but * * * probably * * * thousands of women * * * felt like cheering when they read * * *" of the public reaction in New Jersey. "Presumably they felt that \$25 * * * inadequate to intimidate others * * * and remembered that courts have even let rapists escape with ridiculously light punishment * * * not * * * so gentle * * * if own families * * * the victim * * * In Delaware * * * if * * * convicted * * * face the death sentence." February 16, Rel. Ex. 40, 41, reported the arrest by Doylestown police of six young Philadelphians said to have committed six Philadelphia robberies, a \$3000 robbery in Bucks County, stolen motor vehicles, violated the fire arms act, and attempted to rob a large Bucks County estate. When arrested they were carrying stolen revolvers and 114 rounds of ammunition. Some of them were acquaintances of Foster, Zeitz, Darcy and Capone. On the front page a box read, "Ten Young Problems"—"Something to worry about in the way of juvenile delinquency has been furnished by ten Philadelphia boys now incarcerated in the Bucks County prison. Four of the boys are charged with murder. Six of the boys are being charged today with robbery, fire arms violations, stick-ups and burglary. Ages of the boys make police and others wonder what's going to happen next? Two * * * are juveniles, age 16 * * * another * * * 17 * * * two * * * are 18; one is 20; one * * * 21; two are 22; * * * one 23. One of the sixteen year old boys carried a loaded revolver in his stocking, and one 18 year old boy was the one accused of pulling the trigger in the murder case."

February 18, Rel. Ex. No. 42, in "Time for An Example", the editor commented: "The Overflow of Philadelphia's young criminals into Bucks County, might, it seems reasonable to believe, be discouraged if the crooks were given sentences which would be impressive and get headlines large enough to be seen and become impressive. Stiff sentences have had that effect before. Once before it brought an epidemic of arson to an end for several years. Another time it taught tramps, who had been filling the county jail and bedeviling the people of lower Bucks, to keep away from the county. Recent arrests of two gangs of young criminals, one of them held for murder, should help to discourage these criminal forays into the county * * * **especially if they are convicted and sent away for impressive periods.** Trying to find excuses for enemies of society invites more crimes." (Emphasis supplied.)

A 17 year old student arrested by the Philadelphia police Rel. Ex. No. 46 was reported to have admitted setting fire to nine buildings, some of them schools; he said he did it "just for fun". The editor

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commented, "Unless the courts recognize the awful possibilities of such an attitude * * * and take away their opportunities for destroying property and lives, the public will continue to be menaced. Institutional restraint for persons with such impulses is the only protection for society and **the protection of the public should be the first consideration.**" (Emphasis supplied.)

In Philadelphia an intoxicated driver in a stolen car, while racing another automobile, lost control, crashed over a sidewalk into a group of women and killed a woman pedestrian. After finding him guilty of murder in the second degree the judge sentenced him to 2½ to 5 years. The Philadelphia Inquirer declared in an editorial, "Mild Sentence for Murder", reported in Rel. Ex. No. 46 on April 2. "Mild Sentence for Murder" said inter alia, "As a deterrent to criminally reckless automobile drivers, the sentence * * * is grossly inadequate * * * Murder, whether with a gun or an automobile calls for penalties that will properly punish the offender and stand as a clear warning to others. This sentence does neither * * * the safety of the careful * * * rather than any hardships suffered by the guilty drivers * * * should be the paramount consideration. The **criminal negligence** responsible for the continuing slaughter on the highways **will not be cured until all culpable parties know their punishment will be sure, swift and severe.** Light penalties will delay the achievement of real highway safety." (Emphasis supplied.)

April 18, Rel. Ex. No. 48, under the title "If 'Sob Sisters' Lay Off", the editor declared, " * * * three of the holdup men * * * captured here, with an arsenal in their car, and sentenced in Philadelphia this week for crimes here * * * will be out of circulation and mischief for a term of years long enough to give them time to realize that crime doesn't pay * * * and * * * serve as a lesson to others. They were sentenced to from ten to thirty years in the Eastern Penitentiary by Judge * * * McDevitt * * * who commented that they would probably 'wind up in the electric chair'. The judge made it clear that he has little hope that characters of their ilk will not (sic) learn the needed lesson * * * and must be restrained from further victimizing the public. 'You wise guys start out with guns and usually wind up in the electric chair', * * * Unfortunately, despite adequate proof that the statement was not an exaggeration in many instances, there still are judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public. It seems to be the time to stop making guinea pigs of the law-abiding members of society."

May 7, Rel. Ex. No. 49, under the title "Jurors Rebuked Again", the editor pointed out that another jury in Philadelphia acquitted a man caught with his arm through a broken window and in possession of a set of burglar tools. It was not clear whether or not his past record was offered in evidence. Speaking again of the Hallowell case the editor suggested the possibility of having professional jurors.

May 25, Rel. Ex. No. 57, under the title "Mercy is Overdone", a news

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story quoted Mr. Justice Jackson's criticism of the majority decision in the Homer Price case, *Price v. Johnson*, 334 U. S. 266 at 295.

June 5, Rel. Ex. No. 78, another news item, "Three Philadelphia Youths lived near Zeitz and Foster * * *" One of those arrested was one Robert White, 18, charged with breaking and entering and stealing a radio.

After the Darcy jury was selected and sworn: June 8, Rel. Ex. No. 84 included a reprint of an editorial from the Philadelphia Evening Bulletin: "Cries of 'maudlin sympathy' * * * last Fall * * * women * * *. On jury * * * blamed * * * No such cries are being heard as the result of two murder verdicts * * * In Doylestown two youths were sentenced by a jury to be executed for murdering a man after a holdup in Feasterville. In Philadelphia another jury, which had nine women among its members, voted a similar penalty in convicting the slayer of a policeman. Four women were on the jury in Doylestown. These verdicts are a vindication of women as jurors, and afford convincing evidence that opinion on use of the death penalty is not determined solely by sex. **Members of these juries deserved the commendation they received from the trial judges.**" (Emphasis supplied.)

June 10, Rel. Ex. No. 90, on the same subject the editor of the Doylestown Daily Intelligencer under the title "Verdicts Highly Praised" stated "Newspapers and individual citizens have in the past week highly praised the jurors who returned a verdict calling for capital punishment for three convicted killers. And on those juries were women in each instance. The Almeida verdict in Philadelphia and the conviction of Zeitz and Foster for murder in this county have been universally lauded. This endorsement of the extreme punishment for callous killers indicates very definitely that the public has become disgusted with the pampering of vicious criminals, although that was clear earlier. Earlier the jury which convicted a Philadelphia murderer in the first degree * * * but only designated life imprisonment * * * was subjected to a storm of denunciation by a great many persons. Imposition of capital punishment may not end all murders, but it does intimidate a great many potential killers."

Finally on June 12 Judge Boyer sentenced Robert White in another court room than that in which Darcy was being tried, out of the hearing and without the knowledge of the Darcy jury.

June 17, Rel. Ex. No. 105, "Raus Mit 'Em"; "Judge Calvin S. Boyer's warning to tough crooks from Philadelphia and other places to keep out of Bucks County or take the consequences * * * should be impressive * * * because recent juries of men and women convicted three trigger happy young holdup men involved in the killing of a respected resident of Feasterville, without provocation, and recommended their execution in the electric chair. The warning has been given before, but not under such impressive circumstances. At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to the vicious lawlessness of a great many

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was one of giving the public the news, the facts to which they were entitled, having in mind the regular as well as the occasional reader.⁴⁷ Overall there was a sincere effort

young crooks who have operated in the county. Convictions of even murderers in the first degree with the death sentence have not been numerous in recent years * * * which should convince potential bandits and killers that leniency on the part of jurors is not likely to be easy to get. For a long time jurors or the court have made it clear that they wanted to give the young offenders every chance to show that they would reform * * * but the evidence appears to unmistakably indicate that Bucks countians have concluded that leniency has merely been taken as an indication of weakness. The conviction of the three young men for a wanton and unprovoked murder * * * the imposition of the death sentence * * * together with Judge Boyer's warning * * * it is to be hoped will cause bandits and killers to steer clear of the county. Getting tough has worked that way in other instances."

* Out with them—see and cf. *A Dictionary of the Non English Words of The Pennsylvania German Dialect* by Marcus Bachman Lambert (1924) Lancaster Press, Lancaster, Pa.

⁴⁷ "The Gossiper", Jan. 16, Rel. Ex. No. 25, contra police chiefs, suggested a solution of juvenile delinquency, i. e., to exclude mystery and thriller stories from the radio. Danger of censorship spreading to books, plays, and the press; suggests gangs, adventure, easy money, sex crimes, mental problems, lax law enforcement, soft treatment, failure to place in institutions, as causes. Advantages of freedom of the press. "If * * * subnormal were given institutional care * * * and the courts and jurors were to dispense with a lot of sentimentality about criminals * * * the general public would not face so many horrible crimes as horrify newspaper readers daily." Jan. 16, Rel. Ex. No. 26, defendants given supervised recreation. Jan. 21, Rel. Ex. No. 27, "Crime is a One Way Street, the Street of Regret", suggests that this warning should be read by every juvenile and many adults. Gangsters may come even from fine parents and fine homes, citing as an example Dutch Schultz whose teacher predicted he would have a bad end. April 3, Rel. Ex. No. 47, futility of attempts to avert publicity when charged with drunken driving. Jail and publicity deter crime. May 23, Rel. Ex. No. 63, bus ride for jury. June 10, Rel. Ex. No. 80, stressing the beauties of the rural area. June 5, Rel. Ex. No. 79, as to the numbers making homes in Bucks County and commuting to Philadelphia. June 12, Rel. Ex. No. 97, defendant's escapades understandable in light of present day movies and radio. June 14, Rel. Ex. No. 100, Darcy's reaction to sentence compared to

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to put out a good newspaper, following time honored traditions, in the exercise of a constitutional freedom—the Freedom of the Press.

In neither case was there any testimony offered on defendant's side of the case.⁴⁸ Foster and Zeitz, although afforded an opportunity by the court, the jury being absent, declined to testify. Darcy did not testify.

The strategy of respective trial counsel for the defense, other than Zeitz, was to show that their client did not fire the fatal shot and, as to all the defendants, to work toward and hope for keeping the punishment down to life imprisonment instead of the death penalty.⁴⁹

that of others in the past. June 18, Rel. Ex. No. 106, suggests that even nailing things down may not stop thieves, citing examples.

May 26, Rel. Ex. Nos. 59, 60, questions on voir dire indicate that the Commonwealth may ask for the death penalty. Rel. Ex. Nos. 63, 64, May 28, in opening the District Attorney left no doubt he will ask for the death penalty in his next speech to the jury. Rel. Ex. No. 70, June 2, "Slowly but carefully the Commonwealth is leading up to the point when it will ask that the jury demand that Zeitz and Foster pay with their lives * * *." Rel. Ex. No. 85, June 9, in opening the District Attorney did not mention the death penalty. He asked for it in the summation of the Foster-Zeitz trial. In re High School Commencement, see Rel. Ex. No. 79, Saturday, June 5, Rel. Ex. No. 88, June 10, time and place of exercises; rescheduling not mentioned, cf. Rel. Ex. No. 93, June 11. There was evidence offered as to when the change, if any, was made.

⁴⁸ N. T. Foster-Zeitz-1295-1297, Rel. Ex. No. 72, June 3, N. T.-T. 860, Rel. Ex. No. 94, June 12.

⁴⁹ Rel. Ex. Nos. 75, 76, Attorney Rubin, " * * * true * * * a Jesse James couple. The Commonwealth want to send these boys to their death. Zeitz, I am certain, is a victim of an unsettled age. I would certainly urge you that life imprisonment and not the death penalty would be proper in this case * * *. They are not desperados; they are 'trigger happy kids', the victims of extreme juvenile delinquency and the times". The District Attorney replied, "Yes, they are a sorry lot today, but they were as brazen as they could be during this trial and during their escapades of crime. There is nothing, in the opinion of the Commonwealth, that would justify anything less than the supreme penalty, which the Commonwealth is asking."

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After the closing pleas of counsel⁵⁰ and the charge of the court on the law and the evidence,⁵¹ a verdict of guilty of

June 14, Rel. Ex. Nos. 98, 99, the District Attorney argued that the defendants' conduct was atrocious and vicious, that they morally murdered three men, Kelly dead, the other two disabled, one for life. "The Commonwealth * * * thinks you will have * * * no trouble in finding the defendant guilty of murder in the first degree. I challenge the defendant to put any mitigating circumstances in this case and we argue that the supreme penalty should be paid." Mr. Achey: Darcy killed no one, therefore he should not pay with the death penalty. "I do not think Darcy is guilty of a cruel and deliberate murder * * *. There is no doubt that a man was killed, and that it was during the perpetration of a robbery, and for that reason the crime of first degree murder has been established, but we ask you to fix the penalty at life imprisonment."

⁵⁰ N. T. Foster-Zeitz 1297, the District Attorney first; limited in rebuttal. N. T.-T. 862. On defense counsel's objection, the District Attorney closed first and was allowed no rebuttal.

⁵¹ Judge Boyer waited until Friday to charge so the jury would have a full day ahead to deliberate; advised that only two defendants were involved; stressed the care with which the jury was selected; explained that they were kept together to assure a fair and impartial trial; that they were the judges of the facts; consider each defendant separately as to guilt and penalty; may consider evidence of Deacon Inn robbery to determine whether defendants committed robbery at Feasterville Inn; if their verdict was guilty of murder in the first degree, with evidence of other offenses in determining punishment or penalty; draw no unfavorable inferences from defendants' failure to testify; presumption of innocence; burden of proving guilt beyond a reasonable doubt. Toward the end of the charge Judge Boyer said, "If you find that it was a murder committed in the perpetration of a robbery, then your verdict should be murder in the first degree." "The punishment or penalty * * * is) * * * left largely to the sound discretion of the jury" (p. 1330). "* * * youth alone does not excuse them from responsibility for their acts * * * (or) * * * from just punishment therefor * * *" (p. 1334). If during the charge the court expressed any opinion on the facts or the conclusions to be drawn therefrom, they were not bound by the court's opinion. "Those matters are for you to form opinions on * * *. In the opinion of the court if you find these defendants, or either of them, guilty of murder in the first degree then the death penalty would be the just and proper punishment for the crime. However, we again remind you that the question is entirely for you and you are not bound by the opinion of the court."

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Exception was taken to the court's expression of opinion as to penalty.

After argument but before decision on defendants' motions for a new trial, illness overtook Judge Boyer, incapacitating him from further service, resulting ultimately in his resignation and death. Upon reargument before Judge Keller and Judge Fred W. Davis, 43rd Pennsylvania Judicial District, specially assigned, the motions were denied. Judgments of conviction and sentence were affirmed; *Com. v. Foster*, March 20, 1950, 364 Pa. 288, 72 A. 2d 279; *Com. v. Zeitz*, March 20, 1950, 364 Pa. 294, 72 A. 2d 282. Each opinion held that Judge Boyer did not exceed the bounds of propriety so long as the question was left to the decision of the jury. Mr. Justice Jones dissented: (a) evidence of other crimes unrelated to questions at issue and were improperly admitted, but see *Com. v. Darcy*, 362 Pa. at 286; *Com. v. DePofi*, 362 Pa. 229; (b) a trial judge should not express any opinion as to the penalty, a question solely for the jury.

Judge Keller commended the patient, careful, undivided attention given by the judge throughout the trial; pointed to the careful, searching examination to obtain jurors who would weigh, consider and pass upon the evidence in a fair, impartial, and dispassionate manner, uninfluenced by sympathy, prejudice, passion or emotion, or by anything other than the law and the evidence; instructed the jury that they were the sole judges of questions of fact; that the facts should be determined only from evidence submitted at the trial not from anything they may have read or heard from any other source; the defendant had a right under the law to be tried separately; they should draw no unfavorable inferences from defendant's failure to testify or offer evidence in his behalf. The court did not review the testimony in detail, stating that it had already been covered by the District Attorney and Mr. Achey, "both able and learned men". The purpose of the testimony as to all other crimes was limited to their possible use in fixing the penalty. After defining murder at common law and under the Act of March 31, 1860, P. L. 382, as reenacted in the Penal Code of June 24, 1939, P. L. 872, 18 P. S. §4701, and explaining the difference between murder of the first and second degrees, the court stated that the true criteria and essence of murder in the first degree was the intent to kill; lacking an intent to kill it would be murder in the second degree. Although the court's explanation of the felony murder doctrine was legally correct, there was a possibility that a layman would under all the circumstances consider that, lacking an intent to kill, the verdict should be guilty of murder in the second degree. At N. T. 904, the court said, "I may say that the law and the courts recognize a distinction as to the penalty to be inflicted in murder of the first degree, and our Supreme Court is on record as stating that when a murder is committed in the course of a robbery, the death penalty, in the absence of mitigating or extenuating circumstances is, to say the least, not viewed with disfavor by the law.

In determining the question as to what the penalty shall be, in

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murder in the first degree fixing the penalty at death was returned by the jury in each case.

After the verdict was recorded at 1:45 P. M. June 4, Judge Boyer was reported (Rel. Ex. No. 78, June 5) as having said to the jury: "I don't see how you could, under the

the event you convict the defendant of murder in the first degree, it will be entirely proper for you to take into consideration whether or not there are any extenuating or mitigating circumstances as to the defendant's guilt in this case.

Members of the jury, we do not wish to be understood that we express any opinion as to what your verdict shall be or what, in the event of a verdict of guilty of murder in the first degree, what the penalty shall be. That is your problem and your duty as you may conclude from the evidence and the law as we have given it to you."

Thereupon the following ensued: "Have I overlooked anything?" Mr. Achey: "Nothing for the defendant, Your Honor." After a few brief remarks by the court—Mr. Biester: "Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree." The Court: "I specifically stated it was completely abandoned in the case of flight or escape. That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt that this shooting of Kelly did not occur during the perpetration of a robbery." Mr. Biester: "I am sorry, but I don't think that would be beyond a reasonable doubt, that it would be on the preponderance of the evidence that it was during the commission of a robbery. I think your Honor inadvertently said that they would have to believe that beyond a reasonable doubt that it was not." The Court: "If I did, that will be withdrawn." Mr. Achey: "I ask for an exception, a general exception, to the charge of the court." The Court: "Exception will be allowed." (Exception noted for defendant.) It was a timely suggestion, the need of which would be apparent to any experienced trial lawyer. District Attorney Biester was an assistant district attorney from 1932 to 1938; District Attorney from 1938 to the time in question (appointed August 16, 1949, to fill the vacancy left by Judge Boyer's resignation). There was obviously no need of a suggestion from outside sources.

June 15, "Observing attorneys offered the opinion that the jurist's charge was 'most fair' to the defendant." Rel. Ex. No. 102.

Following the verdict, a timely motion for a new trial was made on the sole ground of error in the admission of evidence of prior crimes.

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evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision."

To place these remarks in their proper context: A few moments earlier in the same court room Judge Keller in discharging the remainder of the May 24 panel commended them for their satisfactory verdicts, the last one of which was an acquittal on a charge of rape. An opinion expressed by Judge Boyer in his charge as to the proper penalty was reported on June 4, Rel. Ex. No. 76.

In convictions for murder the sole, absolute and final responsibility for the verdict and its consequences rests with the jury. Here no question was raised as to identity or as to the defendant's participation in the robbery. The confessions were not repudiated; the testimony was uncontradicted. In the opinion of the Supreme Court of Pennsylvania Zeitz "showed extreme callousness and brutality in his actions and his remarks during the course of the holdup"; *Com. v. Zeitz*, 364 Pa. at 296; the three defendants were described as "bandits". *Id.* p. 296. And see opinion Chief Judge Biggs, 203 F. 2d at 419, "The crime * * * admittedly committed was a brutal one, meriting severest moral condemnation * * *"; *Com. v. Darcy*, 362 Pa. at 278, "Under this evidence for a jury not to have found that these men were engaged in a common law robbery would have been perverse."

Monday, June 7, court was called at 10:00 A. M. with both judges presiding. After some miscellaneous business

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was disposed of, the defendant was arraigned, plead not guilty, and upon Judge Keller's direction selection of a jury was commenced at 10:15 A. M. As to the voir dire examination, see *supra* and see opinion Maris J., *supra*, 203 F. 2d at 423; Resp. Ex. No. 5, Par. 13, "Each juror * * * called * * * carefully examined and cross examined * * * in order that the defendant might be tried by a jury free of bias, prejudice or preconceived opinion regarding the guilt or innocence of the accused. * * *"

Defendant was represented by Webster S. Achey, Esq. and William M. Power, Esq., residents of Doylestown, engaged on defendant's behalf. Attorney Achey, at one time an Assistant United States Attorney for the Eastern District of Pennsylvania and engaged in the practice of the law for some thirty years, was one of the ablest and foremost active trial lawyers of Bucks County. His ability as such was recognized throughout the eastern section of Pennsylvania (see Resp. Ex. No. 5). In his charge the trial judge described him as "able and learned"; the Supreme Court of Pennsylvania (367 Pa. at 133) as "a highly reputable attorney of his own (Darcy's) choosing, eminently qualified from the standpoint of ability, experience and industry." Attorney Power "while a young man with less experience was a very good trial lawyer" (Resp. Ex. No. 5).

From early March defense counsel knew that the Darcy trial would follow that of Foster and Zeitz. At no time did they make any objection to this arrangement. We assume that they were aware of current local events⁵² (cf. N. T.-T.

⁵² June 4, Rel. Ex. Nos. 75, 76 (speculating that Darcy would plead guilty if the Foster-Zeitz verdict was life imprisonment go to trial if it was death; speculation as to cost of prosecution). Rel. Ex. No. 77. June 5, Rel. Ex. No. 78 (2 items); Rel. Ex. No. 79 (a one paragraph item on p. 3, "Police official quoted as saying that, if the killers of Kelly were not given the death sentence, the electric chair should be

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260-261, they knew about the venue statute; N. T.-T. 831, and Judge Boyer's remarks of June 4). They were also then confronted with the status of the law in Pennsylvania and the pronouncement of the Pennsylvania Supreme Court in *Com. v. Flood* (1930), 302 Pa. 190 at 196, "While defendant's right is clear, those of society are also clear; it is important that their interests should be protected against unnecessary delays. Persons accused of crimes should be brought to as speedy a trial as the exigencies of their cases demand, otherwise one of the benefits accruing to society will be lost or seriously diminished. Delays through unwarranted or unnecessary continuance should cease." *Com. v. Skawinski* (1934) 313 Pa. 453, denial of application for change of venue, Act of March 18, 1875, P. L. 30, 19 P. S. 551, and of a motion for a continuance; *Com. v. Riggs* (1934) 313 Pa. 457, quite like the present situation; *Com. v. Smith* (1898) 185 Pa. 553 at 557, 558, 40 A. 73; *Com. v. Buccieri* (1893) 153 Pa. 535 at 545, 26 A. 228, "A very gross abuse of this discretion would have to appear." "The question of change of venue is one peculiarly within the sound judgment of the (trial) court," *Id.* at 546; *Com. v. March* (1915) 248 Pa. 434, 438, 94 A. 142; *Com. v. White* (1922) 271 Pa. 584, 589, 115 A. 870; *Com. v. Schurtz* (1940), 337 Pa. 405 at 409, 410, 10 A. 2d 378; *Com. v. Shadduck* (1951), 168 Pa.

destroyed * * *", and his opinion being agreed with by those who heard the statement). June 7, Rel. Ex. Nos. 80, 81, editorial. Philadelphia Evening Bulletin, see footnote 46, *supra*, p. 27. June 8, Rel. Ex. No. 82, published at 1:30 P. M., reported the names of the 12 jurors selected—8 of them before adjournment on June 7—2 alternates were selected before 2:00 P. M. Rel. Ex. Nos. 83, 84, reprint of Evening Bulletin editorial of June 7. While the 4 jurors and 2 alternates selected on June 8 conceivably could have seen the Bulletin editorial of June 7—of which there is no evidence—the local paper of June 8 was not available to any of the 14. *Id.* as to all other newspapers, magazines, or other reading material, except the evidence, for the remainder of the trial.

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Super. Ct. 376, 77 A. 2d 673; and see *Hart v. United States* (1940), 5 Cir., 112 F. 2d 128 at 131; *Paschen v. United States*, 7 Cir. 1934, 70 F. 2d 491 at 494; cf. *Com. v. Karmendi* (1937), 328 Pa. 321 at 337, 338-340, see 342 and particularly 349, 350, 351; and see our opinion in *United States v. Handy*, supra, 97 F. Supp. 930 at 935. The time and place to ascertain the existence of any disqualification was on the voir dire. See *Id.* 937; *United States v. Handy*, 203 F. 2d 407 at 423; *Com. v. Pasco* (1938, 332 Pa. 439, 2 A. 2d 736; *United States v. Rosenberg* (1952), 200 F. 2d 666 at 668, 669, particularly apposite; *United States v. Moran* (1952), 2 Cir. 194 F. 2d 623 at 625; *Allen v. United States*, 7 Cir. (1925), 4 F. 2d 688 at 695, 699; see *Reynolds v. United States*, 98 U. S. 145, 155, 156, "The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits * * *. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. * * * jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. * * * The affirmative of the issue is upon the challenger."

As to what constitutes disqualifications of a juror, in Pa., see *Com. v. Zell and Herr*, 81 Pa. Super. Ct. 145 at 148, "The presumptions are * * * that all the jurors selected were * * * sober, intelligent and judicious persons: * * *"

selected from the whole county * * * free from local influence or prejudice." "The law upon this subject has necessarily advanced with the changed circumstances; it has merely kept abreast of the times, and adapted itself to what the common judgment and common sense of the people see is essential to the proper administration of the criminal law. To return now to the old rule, would exclude from the jury box in many instances every man of average intelligence." *Rizzolo v. Com.* (1889), 126 Pa. 54 at 72, 72. "Intelligent men receive impressions as to the nature and character of any transaction from what they hear and read of it, and it is not unusual to speak of these as opinions." *Com. v. Crossmire* (1893), 156 Pa. 304 at 308. "We have held repeatedly * * * that the test of the competency of a juror in a capital case is his ability to render a verdict upon the evidence, and upon the evidence alone, uninfluenced by any opinion which he may have previously formed from newspapers or other reports of the crime * * *. In *Allison v. Com.*, we held that where a juror in a criminal case has formed an opinion from hearing or reading the evidence upon a former trial, he is incompetent, even if his opinion thus formed does not come up to the standard of a fixed opinion. But this rule does not apply where the juror has heard or read only fragmentary portions of the evidence; on the contrary, his opinion must have been formed upon all the evidence in the former trial against the same prisoner, before the disqualification referred to attaches; and it was distinctly ruled in the same case (*Allison v. Com.*, *supra*), that hearing or reading the evidence upon a preliminary examination * * * was not a trial within the meaning of this rule. We need not discuss this question further. It is worn threadbare, and the law ought to be now well understood." *Com. v. Taylor*, 129 Pa. 534 at 540, 541. "Ig-

ignorance of everything except the facts testified to by witnesses in the case on trial is not a constitutionally required qualification of American jurors." *Com. v. Darcy*, 362 Pa. at 271. " * * * challenge of a juror for cause is addressed to the trial judge * * * much weight must be given to his judgment in passing upon it. In exercising his discretion as to the fitness of a juror to serve, he has the juror before him, and much latitude must be left to him; * * * the weight to be given to the answers of a juror when examined on his voir dire is not to be determined exclusively by his words as we read them in the printed record * * *. Nothing short of palpable error will justify a reversal of a trial judge in passing upon a challenge for cause." *Com. v. Sushinski*, 242 Pa. 406 at 412, 413.

Whether he should have moved for a continuance or a change of venue was obviously, as every lawyer knows, a matter of judgment to be decided in the light of the circumstances as measured by various considerations of trial policy. Defense counsel chose not to do so. What change any delay in the trial would have produced is pure speculation. In fact, in examining the witnesses in the Darcy trial, defense counsel on occasion referred to the testimony of the previous trial. See e. g., N. T.-T. 324-367. What of the wisdom of his choice? "It is a familiar observation that cases are better tried from the 'side lines' by lawyers who would do no better in the heat of the conflict if they conducted the trial. And of course it is easy to condemn the exercise of counsel's judgment, after the case is lost which would be praised if the case were won. But no lawyer can be expected to do more than exercise a reasonable skill which cannot be fairly judged by the result of the trial alone." *Com. v. Thompson*, 367 Pa. 102 at 109.

Assuming arguendo, there was some evidence of hysteria

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and prejudice.⁵³ see and cf. 203 F. 2d at 423, where Judge Maris sagely observed, "* * * a jury trial, just as every other human enterprise, is a fallible proceeding. Every juror who has ever been empaneled has been subject in greater or lesser degree to human passions and prejudices. These he is required to lay aside when he takes his oath as a juror. How successfully this is accomplished in practice has always been a matter of dispute but the deep and abiding place which the jury system has achieved in our institutions attests the fact that the standard of impartiality has normally been attained to a degree which is satisfactory to the community." And see *Com. v. Buccieri*, *supra*, 153 Pa. at 546, "Indignation, because of the cruelty of the deed, there doubtless was; it would be strange if such were not the case in a law abiding community; but there is nothing which convinces us of the existence of such passion or prejudice as would prevent the twelve 'sober, intelligent, and judicious' jurors who were sworn to try the issue from rendering a true verdict on the evidence." There was some testimony as to some people being shocked; some indig-

⁵³ The trial judge certified that there was no hysteria or prejudice either before, during or after the trial. See *Resp. Ex. No. 5*, Par. 18. *Id.* par. 23, "* * * the same conditions prevailed as in the Darcy trial, in that it was quiet, orderly, and free from any disturbance, displays of excitement, prejudice, or evidence of any emotional outbursts or hysteria whatsoever." *Id.* par. 24, "Although the proceedings of both of the trials of Harold Foster and Harry Zeitz and that of David Darcy were publicized through the local and county newspapers as well as Philadelphia, Trenton, and possibly some other newspapers, these reports were read and received as a matter of news by the residents of the county, and the undersigned, a resident of Doylestown, neither heard nor saw any manifestations of hysteria or prejudice having swept the town as the result of these newspaper stories. Furthermore, in view of their answers under oath during their voir dire examination, the undersigned is convinced that the jurors selected had not been influenced by any newspaper stories, radio or other news reports or by any manifestations of prejudice or hysteria against the defendant."

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nant; other testimony that some people in certain parts of the country, particularly in the Feasterville area, not many overall, had ideas as to what the punishment should be. In this connection it must be remembered that Bucks County was one of the three original counties established at the first settlement of the province of Pennsylvania in 1682 (land area 617 sq. mi.; pop. 1950—144,620, 1940—107,715; pop. per sq. mi. 234.4; urban 24.1% 1950, 29.4% 1940, Pa. Manual, Vol. 91, 1953-1954, pp. 994, 997).

Defendant's counsel apparently made a deliberate choice not to seek delay or a change of venue. Many reasons could be suggested for their decision. We will not indulge in speculation. At all events there was a waiver of any right they may have had.

*** it *** is for the Pennsylvania courts to say under its law what duty or discretion the court may have had. Nothing in the record impeaches the fairness and temperateness with which the trial judge (and we add the District Attorney) approached his task. His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." *Gryger v. Burke* (1948), 334 U. S. 728 at 731.

"If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but

as a demonstrable reality." *Adams v. United States ex rel. McCann*, 317 U. S. 268 at 281. This the relator has not done.

Finally as to Judge Boyer's asserted visits to the court room. (Hon. Calvin S. Boyer was for some years District Attorney for Bucks County; later United States Attorney for the Eastern District of Pennsylvania, and from June 21, 1930, to sometime in 1949 additional law judge of the several courts of Bucks County. *Rel. Ex. No. 124*, p. 754.) From the time of the occurrence and throughout the Foster-Zeitz trial Judge Boyer's conduct was fair and impartial. In fact, the only time his name appears in connection with the indictment was on March 1 when the court suggested the possibility of a joint trial; again on March 3 when Judge Boyer promptly complied with a request therefor naming two lawyers to represent Harold Foster. On the question of admissibility of evidence of other offenses Judge Boyer restricted the Commonwealth to a purpose narrower than that approved by the Pennsylvania Supreme Court on appeal.

By long established tradition in Bucks County, each morning and afternoon at the opening of course both judges take the bench to entertain motions and other miscellaneous matters in the Criminal, Common Pleas—law and equity—and Orphans Court. Once this work is completed, one of the judges, if engaged in a trial in that court room, remains on the bench; the other judge leaving to perform duties in another court room or in chambers. The practice used in many Pennsylvania courts, *N. T.-H. 365*, was continued daily no matter what court was in session or the nature of the trial, see *Rel. Ex. No. 115*, p. 8; not on June 4 when Judge Boyer charged the jury; and, according to *Rel. Ex. No. 116*, not on June 8 and 10.

The criminal docket, Rel. Ex. No. 10, a record of individual trials, shows both judges on the bench at 10:00 A. M. May 24 (p. 339); 9:30 A. M. June 2 (p. 348); 10:00 A. M. June 7 (p. 352). The court reporter's notes of testimony show only one instance of Judge Boyer taking any part whatsoever in the Darcy trial, i. e., during a sidebar discussion out of the hearing of the jury shortly after court convened on Saturday morning, June 12 (N. T. 827). Under consideration was a difficult question of law on the admissibility of evidence of other offenses (see Resp. Ex. No. 5, par. 20) in view of the Act of July 3, 1947, P. L. 1239. Judge Boyer indicated his thinking on the matter. Upon objection by counsel⁵⁴ the discussion ended; Judge Keller ruled; Judge Boyer left the bench shortly after and did not return during the remainder of the trial.⁵⁵ It may be that during the Foster-Zeitz trial Judge Keller shortly after 9:30 A. M. June 2 (cf. Rel. Ex. No. 1, N. T. 1194) listened

⁵⁴ Judge Boyer: That applies only to cross-examination.

Mr. Achey: I object to Judge Boyer sitting in on this case. I don't mind trying against one judge —

Judge Boyer: The judges reserve the right to confer without being obliged to get the consent of defense counsel.

Mr. Achey: In view of the statement which Judge Boyer made to the jury in the trial of Foster and Zeitz, which was tried last week, I submit that he has disqualified himself from sitting in on this case, and it is prejudicial to the defendant. My objection, further, to the offer, is that the evidence of the commission of other crimes is not permissible in this particular case because it is restricted by the amendment of the Act of 1947.

The Court: The objection is overruled.

(Objection noted for defendant.)"

End of sidebar, N. T. 831. Any statements made at sidebar were unknown and never called to the attention of the jury. Resp. Ex. No. 5, par. 21.

⁵⁵ The statements were admitted for a more limited purpose than the Supreme Court of Pennsylvania approved on appeal. See *Com. v. Darcy*, 362 Pa. at 283.

to but did not express any opinion during a similar discussion.⁵⁶

Honorable Hiram H. Keller, president judge since April 30, 1930, who presided with eminent fairness throughout the trial, has certified Resp. Ex. No. 5, par. 20-21) that after the miscellaneous business was completed, "On several occasions * * * Judge Boyer remained for brief periods while of the incident reported at N. T.-T. 831, "At no other time, evidence was presented * * *," and that with the exception during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the undersigned in the trial of this case."

The District Attorney, now Judge Biester, testified, and we find as a fact, that Judge Boyer did not at any time during the Darcy trial assist, attempt to assist, make any suggestion to or in any other manner aid the Commonwealth in the prosecution of the case against David Darcy; that Judge Boyer did not pass any note or message of any kind to the District Attorney in connection with the trial for the use of the District Attorney or Judge Keller.

On several occasions during the Darcy trial—not on Friday evening or during the charge of the court on Monday, June 14—Judge Boyer sat for brief intervals on a chair just inside the court room door from the judges' chambers, apparently listening to the proceedings. On several occasions during the Foster-Zeitz trial, Judge Keller sat for short intervals in the same area the judges in Bucks County did not at that time wear robes).

During the Darcy trial Judge Boyer did not at any time sit at or near the table reserved for the press; at or near the

⁵⁶ As to other criminal matters between May 24-June 15; see Ex. Nos: 115, 137, a number of cases before Judge Keller May 24 to 27 and June 1 to 4 incl.; a number of defendants, one of whom was Robert White, before Judge Boyer June 11.

table reserved for the District Attorney; at no time did Judge Boyer sit on a chair next to or anywhere near a chair occupied by the District Attorney.

Throughout the trial, the only chairs occupied by the District Attorney or his assistant were at the table reserved for that purpose, or in chairs immediately in front of the table reserved for the press.

At no time other than that noted in N. T.-T. 830 did Judge Boyer take any part whatsoever in the proceedings of the Darcy trial.⁵⁷

Friday, June 12, Judge Boyer in sentencing Robert White, 18, one of three Philadelphia youths, for stealing a car radio, to four to twelve months, was reported (Rel. Ex. No. 94) to have said: "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched * * * what business did you have to come up here in the first place? * * * So far as your testimony is concerned, you have not shown any excuse at all to come out of Philadelphia to Bucks County. * * * Have you heard what's going on downstairs? Do you want to end up like that?"—"I'd like to have another chance," said the youth whose mother described him as a 'good boy'." "We in Bucks County are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it." Said Judge Boyer, "Unless you get an entirely different idea or conception of what belongs to

⁵⁷ Before the closing pleas in the Foster-Zeitz case Judge Boyer did not say, "Now we will be able to start the Darcy case next week." He did not tell school children—with the jury present—that the defendants were going to be convicted of murder. See N. T.-H. 759, 918 and 382. Judge Boyer did not discuss the pending case or the defendants with the witness Davis. N. T.-H. 430, et seq. Credibility is for a trier of the facts. See *Hawk v. Olson*, 326 U. S. 271 at 279.

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you and respect for other people's property you will have a sorry life." If one recalls the arrest on February 16 of six young Philadelphians on serious charges (see note 46, *supra*, p. 25, 26, 27), making ten youngsters in the County Prison at that time, and the arrest of the three in question on June 5, Judge Boyer's remarks may be appraised in a different light than one of condemnation. The sentence was moderate under the circumstances. At all events the sentence was passed and the remarks made in a court room other than that in which the Darcy trial was progressing. The jurors in the Darcy trial knew nothing whatsoever as to the sentence and the remarks. What occurred could not possibly have, and did not in fact have, any effect whatsoever on the outcome of the Darcy trial. It did not reflect in any manner hysteria or prejudice on Judge Boyer's part toward any of the four defendants charged with murder.

After the verdict in the Darcy trial was recorded and the jurors dismissed with the thanks of the court, there was no display of any kind in or outside the court room.⁵⁸ It was reported (Rel. Ex. No. 102) that as the spectators left the court house there was widespread comment approving the verdict and the efficient manner in which the Commonwealth had prepared its case. "They seemed to pity the parents; not the defendants in this case."

The respondent moves to dismiss on the ground that the

⁵⁸ June 8, Rel. Ex. No. 82, June 11, Rel. Ex. No. 91, June 12, Rel. Ex. No. 94, reported efforts of defense counsel to keep evidence of other offenses from the jury. June 10, Rel. Ex. No. 90, see note 46, *supra* at p. 27, an editorial praising the Foster-Zeitz verdict; June 12, Rel. Ex. No. 94, a news item as to a friend of Darcy's being arrested on his way to the trial; June 14, Rel. Ex. No. 98, awaiting verdict; June 15, Rel. Ex. No. 101, report on verdict; suicide rumor false, Rel. Ex. No. 102, speculation on cost of prosecution. And see "Bucks County Justice" as a term of approval. June 17, Rel. Ex. No. 103, in re possibility of error in rulings in murder trial.

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evidence is insufficient in quality and quantity to support the allegations of the petition.

After "in a sense" traversing the highways and byways of Bucks County; spending long hours in its newspaper columns, and on the editorial and other pages; listening to reports as to the sentiments of its people in Doylestown and throughout the county (see amendment of the petition, N. T.-H. 393), fully aware of its long tradition as a law abiding community; pondering on the results in the light of Section IX of Article 1 of the Pennsylvania Constitution and Section I of the Fourteenth Amendment of the United States Constitution, we have fully and completely complied with the mandate of the Court of Appeals. With what result? Only to be more confirmed in our conclusions expressed in our opinion on May 17, 1951, that the defendant was afforded in form and in substance a fair and impartial trial in the Court of Oyer and Terminer in Bucks County, Pennsylvania, in June, 1948; that the allegations of the petition for habeas corpus are without support in the record and in the evidence; that the defendant was afforded due process of law under the Constitution of Pennsylvania and the Constitution of the United States.

There is nothing here akin to *Shepherd v. Florida*, 341 U. S. 50, 51; *Frank v. Magnum*, 237 U. S. 309 at 355; *Moore v. Dempsey*, 261 U. S. 86; see *Ashe v. Valotta*, 270 U. S. 424, 426; and see *Stroble v. California*, 343 U. S. 181 at 193, 194; *Buchalter v. New York*, 319 U. S. 427 at 430; *United States v. Rosenberg*, 200 F. 2d 666.

As Mr. Justice Cardozo said in *Snyder v. Massachusetts*, 291 U. S. 97 at 122, "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament: We are to keep the balance true * * *. There is danger that the criminal law will be brought into contempt—that discredit will

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even touch the great immunities assured by the Fourteenth Amendment--if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

The findings of fact and conclusions of law submitted by relator and respondent as are in agreement with this opinion are hereby adopted and affirmed. Such findings of fact and conclusions of law submitted by the relator and respondent as are in disagreement with our opinion are hereby denied.

The petition for a writ of habeas corpus will therefore be denied: our stay order heretofore entered on November 5, 1953, will be terminated and come to an end.

The Commonwealth of Pennsylvania so far as this court is concerned is free to pursue the proper legal processes to see that the sentence and judgment of the Court of Oyer and Terminer of Bucks County be carried out.

/s/ JOHN W. MURPHY,

United States District Judge.

February 12, 1955.

Albert L. Watson, Chief Judge, joins in all the views expressed in this opinion.

/s/ ALBERT L. WATSON,

Chief Judge, Middle District
of Pennsylvania.

(2).

APPENDIX TO OPINION.

As to Respondent's request for findings of fact: Affirmed—No. 1, pp. 16, 17; No. 2, pp. 15, 16; No. 3, p. 18, proper date May 27; No. 4, p. 17, see Slaughter incident, note 29; No. 5, p. 18, note 34; No. 6, p. 18; Nos. 8, 9, 10, 11, 12, 13, p. 20; No. 14 as modified, pp. 20-22; Nos. 15 and 16, p. 20; No. 17; No. 18 as modified, pp. 32, 39, 40, 41; No. 19, pp. 42, 43; No. 20, pp. 40; No. 21, pp. 31, 41; No. 22, p. 41; No. 23, p. 41. Denied No. 7 as stated, p. 19.

As to Respondent's request for conclusions of law: Nos. 1 to 6 inclusive are denied; No. 7 affirmed; No. 8 affirmed as modified.

As to Relator's request for findings of fact: No. 1, affirmed as amplified, pp. 11, 12; Nos. 2, 3, 4, denied, p. 23; Nos. 5, 6, affirmed as modified, p. 23; Nos. 7, 8, affirmed, p. 23; No. 9, denied; No. 10 denied, pp. 24-29; No. 10a, affirmed as modified and in context; (b) affirmed in context; (c) affirmed in context, p. 24, et seq., note 46 and 47; (d) affirmed as to heading, details of crime not repeated; (e) affirmed, p. 25; (f) affirmed in part, denied as to details; (g) denied as stated, p. 25; (h) denied as stated, affirmed as to quotes; (i) affirmed in context; (j) denied as stated, item misquoted, p. 28, note 47; (k) denied as stated, p. 28; (l) denied, p. 28; (m) denied as stated; (n. Ex. 31 denied as stated, title misquoted, p. 25, affirmed as to Ex. 30; (o) possibly misleading interpretation, defendants cases not mentioned; (p) denied, misleading and misquoted, correct as

Appendix to Opinion

to heading of news item, p. 25; (q) denied as stated; (r) denied as stated, p. 25, affirmed as to Ex. 39; (s) misquoted, see pp. 25, 26; (t) denied, p. 26; (u) denied; (v) a twelve line news item; (w) affirmed, p. 26; (x) conclusions denied; (y) misquoted, pp. 26, 27; (z) denied, p. 27; (aa) (cc) (dd) names of jurors only; (bb) substantially correct, p. 16, note 27; No. 11 denied as stated, see p. 23 as to coverage; No. 12 misquoted in part, pp. 31, 32; No. 13, quotes correct, one juror selected before noon; No. 14 denied, p. 24, note 44; No. 15 denied, misquoted, p. 24, note 44; No. 16 denied; Nos. 17, 18 denied, p. 21, note 40; No. 19 denied, p. 21; No. 20, denied; Nos. 21, 21a denied, p. 20, note 39; No. 22 denied, pp. 15, 39; No. 23 affirmed; No. 24, Ex. 51 misquoted. Ex. 55, 56 affirmed, but see p. 16, note 27; No. 25 denied as stated; No. 26 denied as stated, p. 28, note 47; No. 27 denied; Nos. 28, 29 affirmed; Nos. 30, 31 denied, p. 17; No. 32 affirmed, p. 18, note 33; No. 33 denied; No. 34 denied, p. 39; No. 35 denied, pp. 15, 39; No. 36 affirmed, p. 31, et seq.; No. 37 denied as stated, p. 42; No. 38 denied, see p. 39, et seq.; No. 39 denied, see p. 42, note 57; No. 39a denied, p. 41; No. 40 denied, p. 41, et seq.; No. 41 denied, pp. 40, 41; Nos. 42, 43 denied, p. 41; No. 44 denied, pp. 41, 31; Nos. 45, 46 denied, p. 39, et seq.; No. 47 denied, p. 39, et seq., and see p. 27, note 46; No. 48 denied, pp. 19 and 21, note 40; No. 49 denied, p. 18, notes 33, 34; No. 50 affirmed, p. 18, note 31; Nos. 51, 52, 53 denied, pp. 18, 19, 34, 35; Nos. 54, 54a, 54b denied.

As to Relator's request for conclusions of law: Nos. 1, 2, 3 denied; No. 4 denied as stated; Nos. 5, 6, 7, 8, 9, 10 denied.

/s/ JOHN W. MURPHY,

United States District Judge.

February 18, 1955.

Order of United States District Court Denying Petition
Certificate of Probable Cause

VII.

ORDER OF UNITED STATES DISTRICT COURT.
DENYING PETITION.

NOW, this 12th day of February, 1955, for the reasons set forth in an opinion handed down this date, relator's petition for a writ of habeas corpus is denied, and the stay order entered by this Court heretofore, to wit, on the 5th day of November, 1953, is hereby terminated.

/s/ JOHN W. MURPHY,

United States District Judge.

/s/ ALBERT L. WATSON,

Chief Judge, Middle District
of Pennsylvania.

VIII.

CERTIFICATE OF PROBABLE CAUSE.

I, Harry E. Kalodner, Judge of the United States Court of Appeals for the Third Circuit, to whom application was made for certificate of probable cause in the above entitled cause, do hereby certify that there exists probable cause for the appeal.

/s/ HARRY E. KALODNER,

Circuit Judge.

March 4, 1955.

[fol. 1245] IN UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 11,564

UNITED STATES OF AMERICA, ex rel. DAVID DARCY, Appellant,

v.

EARL D. HANDY, WARDEN OF BUCKS COUNTY PRISON, DR.
FRED S. BALDI, Warden of the Western State Penitentiary,
Rockview, and Carl H. Fleckenstine, United States Mar-
shal for the Middle District of Pennsylvania

Appeal from the United States District Court for the
Middle District of Pennsylvania

Argued April 4, 1955

Before Biggs, Chief Judge, and Maris, Goodrich,
McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed June 9, 1955

By HASTIE, Circuit Judge:

In this habeas corpus proceeding the relator, a Penn-
sylvania state prisoner under sentence of death for murder,
is contending that he was tried under such prejudicial cir-
cumstances and improper influences that it becomes the
duty of a federal court to invalidate the state conviction
as a denial of due process of law and to order a new trial.
[fol. 1246] The district court originally dismissed the peti-
tion without permitting relator to introduce evidence in sup-
port of his contentions. 97 F. Supp. 930. But on appeal this
court ruled "that the relator must be afforded the oppor-
tunity to prove the allegations set out in his petition for
habeas corpus insofar as they relate to the alleged atmos-
phere of hysteria and prejudice prevailing at this trial, in-
cluding any issues raised by Judge Boyer's asserted visits to
the courtroom during Darcy's trial, since the undisputed
and incontrovertible facts as shown by the record do not
countervail the allegations of hysteria and prejudice." 203

F. 2d 409. Accordingly, the case was remanded to the district court for a full hearing on the indicated issues.

In compliance with our mandate the district court permitted the parties to make an elaborate showing of the circumstances under which the relator was tried in Bucks County, Pennsylvania, for felonious homicide in the commission of an armed robbery. Although the relator had been contesting his conviction for more than six years, this was the first opportunity given him to introduce evidence to establish facts not apparent on the face of the original trial record which, in his view, would make clear that the trial was fundamentally unfair. In affording this opportunity, the district court devoted eight days to the testimony of more than thirty witnesses and the introduction of much documentary evidence. As a result, that court and this reviewing court now for the first time have been able to exercise fully informed judgment as to the essential fairness of the murder trial. It was especially important that this be done because there had been no taking of testimony on the relevant circumstances of the trial before any Pennsylvania state court in which the conduct of relator's trial had been challenged as essentially unfair. We emphasize this because we believe it is a virtue of our system of justice, as implemented by the due process clause of the Fourteenth Amendment, that it does not send a convicted person to his death without according him one full opportunity to prove charges of unfair trial which are not patently frivolous. The important thing here is that the district court was satisfied that relator's new proof was insufficient to establish that his trial had been fundamentally unfair. — F. Supp. — We agree with that conclusion.

Relator has attempted to show that he was tried in a community so aroused against him that a fair trial was impossible, or at best so unlikely that a decent legal system must permit a second trial. Such a conclusion has been reached where the physical presence of a mob or a threat of mob violence has dominated a criminal trial. *Frank I. Mangum*, 1915, 237 U.S. 309; *Moore v. Thompson*, 1923, 203 U.S. 86; *Powell v. Alabama*, 1923, 207 U.S. 48. But on

the evidence adduced in the district court it is clear, as that court found, that relator's trial was conducted with dignity and decorum and without any hostile congregation or demonstration at or near the place of trial. Indeed, during much of the trial the courtroom was not crowded. Certainly, the trial was not attended by any threat of violence or manifestation of mass hysteria. Moreover, a clear and elaborate showing was made to the district court that throughout relator's trial the jury was kept under strict guard, apart from other persons and without access to newspapers, radio, television or any other source of news or opinion.

However, the relator suggests that even though the jury was segregated and the community was outwardly calm during the trial, antagonism and hostility toward him were so great and wide-spread during the period immediately preceding the trial, that the probability of a prejudiced verdict from any jury of the vicinage was a greater risk than a society which insists upon equal justice under [sic, 12th] law can take. A combination of unchallenged facts has made it very difficult for the relator to establish such extreme and pervasive hostility. The record of the original trial, which is before the court in this collateral proceeding, shows that each of the prospective jurors was subjected to a searching voir dire examination. The questioning of the fourteen persons who became the jurors and alternates for this trial takes up some seventy pages of the typewritten record. Their responses indicated that they were capable of making and disposed to make a fair and objective evaluation of the evidence. Beyond that original counsel for the relator was sufficiently satisfied with the responses of these gentlemen so that he used less than half of the peremptory challenges available to him. And he did not at any time ask for a change of venue. Concerning the significance of this, see *Stroble v. California*, 1952, 343 U.S. 181, 194; *United States v. Rosenberg*, 2 Cir. 1953, 200 F.2d 600, 603. While in a majority of this court those facts alone have not seemed as compelling as to prohibit an independent showing that the trial was dominated by prejudice and hostility, they certainly make the undertaking very difficult. To meet the difficult burden of proof which

has relied largely upon the daily newspaper accounts and editorial comments published in the community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial. We have examined all of this material. The evidence does not indicate, as relator would infer, that the jurors who tried relator were waiting in or near the courtroom during the period of the trial of his confederates. At most it indicates that during the two weeks immediately preceding relator's trial the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators. But it does not appear that feeling ran so high or that hostility toward the relator was so intense and so general as to make it seem incredible that the search [fol. 1249] for a satisfactory jury would yield twelve persons as open minded about this case as the jurors here claimed to have been. The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, yet not be convinced that failure to follow the wiser course was a denial of the essence of fair trial. The due process concept does not embrace all that a very careful and perceptive judge might do to protect a trial against emotional factors. It covers no more than the minimum protection which, consistent with our present ideas of justice, every court must afford. In this view of the reach of due process, we can not say that trial of relator at the time and place in question was a denial of constitutionally required protection.

Relator makes a second contention. Judge Hiram Keller presided over relator's trial. But another judge of the same court, Honorable Calvin Boyer, was much in and about the courtroom during the course of this trial. Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and, according to the press, he had commended the jury for its verdict. It is relator's contention that Judge Boyer's participation in and in-

fluence upon the trial were so unfair and prejudicial as to amount to a denial of due process of law. Here too the facts are now for the first time fully disclosed in the record. Relator's trial began June 7 and he was convicted June 14. There were daily morning and afternoon sessions. It now appears that every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session. At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although [fol. 1200] there is nothing to suggest that the jury could hear what was being said. It is also admitted that at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling. However, there is no claim that any erroneous or prejudicial ruling resulted from consultation between the presiding judge and his colleague. Finally, during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar and participants in the trial.

It seems to be agreed that the jurors knew who Judge Boyer was. The evidence makes it very probable that they also knew that he had just completed the trial at which relator's co-defendants had been convicted and sentenced to death. Moreover, it had been reported in the press that Judge Boyer had commended the jury for the first degree verdict against the co-defendants with its mandatory death penalty. Relator also makes the point that, while his trial was in progress, the press quoted statements of Judge Boyer in another case reasonably calculated to indicate that the jurist was engaged in an effort to make it clear that the community would deal very sternly with wrongdoers from Philadelphia, a category which included the relator. But this last incident could not have affected the jury in relator's case, because the jurors had no access to any source of news. Nevertheless, relator argues that the overall effect of this situation was to make Judge Boyer's impressive record of attendance at this trial an intolerably coercive influence upon the trial jury. But we think this is attaching too much significance to the jury's observation that a judge other than the trial judge was showing much

interest in the case. Certainly Judge Boyer was privileged to attend and observe proceedings of the court of which he was a judge. His presence in itself was not an impropriety. Even if the jurors identified him as an official who was hostile to the relator, we think it would be necessary to show that he had said or done something prejudicial to the defendant [fol. 1251] during his stay in the courtroom before the fact of his presence and manifest interest could raise a substantial due process question.

The present petition charges one such act and this allegation has given us great concern. The relator alleged and attempted to prove that during the trial Judge Boyer actively helped the prosecutor. Specifically, there was testimony from witnesses who may well not have been unbiased that on one occasion Judge Boyer passed a written message to the prosecutor with the result that the prosecutor made a point to the presiding judge about an item in the charge. The government introduced evidence for the purpose of disproving this contention. The government's showing was less than overwhelming. Yet it was not unsubstantial. There was a sufficient conflict of testimony to make it necessary for the district court as the trier of facts in this habeas corpus proceeding to resolve the factual question whether Judge Boyer did or did not coach and advise the prosecutor as alleged. The district court made a specific finding that this alleged occurrence did not take place. On the record we think that we are not justified in disturbing that finding. And absent some such improper partisan participation by Judge Boyer in the trial, we cannot say that his rather striking manifestation of extraordinary interest in the proceedings constituted a denial of due process of law. It is established constitutional doctrine that our limited function in correcting fundamental impropriety in state trials challenged under the due process clause makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court. With *Beits v. Brady*, 1942, 316 U.S. 455, contrast *Johnson v. Zerbst*, 1938, 304 U.S. 453.

No other point urged by relator warrants appellate interference with the decision of the district court or requires particular comment.

The judgment will be affirmed.

[fol. 1252] KALODNER, Circuit Judge, dissenting:

Under Pennsylvania law the jury fixes the penalty in first degree murder cases—imprisonment for life, or death.¹

It is against the forefront of that grim and grave circumstance that Judge Boyer's conduct in the Darcy trial must be viewed, weighed and assessed and the issue determined whether Darcy was denied the due process guaranteed him by the Fourteenth Amendment. In doing so it must ever be kept in mind that "due process of law in the enforcement of a state's criminal law . . . expresses a demand for civilized standards of law" and "judicial review of that guaranty of the Fourteenth Amendment inescapably imposes . . . an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people *even toward those charged with the most heinous offenses*".² (emphasis supplied).

In my opinion the majority has failed to discern and assess the impact of Judge Boyer's conduct in the Darcy trial from the point of view, at the minimum, of the jury's role in determining Darcy's fate—life or death.

I am of the opinion, too, that the majority erred in another important respect—in treating Judge Boyer's conduct as an "occurrence", albeit "dubious", "in state procedure", immune as such, from federal judicial remedial action.

Let us first consider the issue of Judge Boyer's role in the Darcy trial.

Bucks County, where Darcy was tried, at the time had a population of approximately 144,000—75 per cent rural.

¹ 18 P.S. § 4701. "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict."

² Concurring opinion of Mr. Justice Frankfurter in *Malinski v. New York*, 324 U.S. 401, 414, 416, 417 (1945).

25 per cent urban. Judge Boyer, then 72 years of age, was [fol. 1253] a native of Bucks County and had spent his entire life in the community. He had been a judge of the Bucks County Courts for some eighteen years. The extent to which he was known in the county is demonstrated by the fact that he had been its district attorney, twice by appointment and once by election; he had twice been elected for 10-year terms as judge (once in 1931 and again in 1941).

Judge Boyer had presided at the trial of Darcy's two confederates which terminated Friday, June 4th with a verdict of guilty and the imposition of death sentences by the jury. Judge Boyer had complimented the jury on its action, stating: *"I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to impose the law which you have indicated by your decision."* (emphasis supplied).³

Three days later, Darcy was placed on trial in the same court house in spite of the fact that he had previously been granted a "severance".⁴ While I agree with the majority

³ Quotation is from a first page article in the "Doylestown Daily Intelligencer" on Saturday morning June 5th carrying an account of the jury's verdict the preceding day. It was captioned "Judge Boyer Praises Jury For Verdict Condemning 2 Killers To Electric Chair". (Relator's Exhibit No. 78).

⁴ Under Pennsylvania law "severances" are granted as a matter of absolute right when applied for by a defendant in a murder case. They are designed to grant the defendant a "separate" trial. It is interesting to note that the majority in noting that Darcy had been placed on trial only three days after conclusion of the trial of his confederates had this to say:

"The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed

that this circumstance, standing alone, did not constitute denial of due process, it merits most serious consideration in evaluating the impact of Judge Boyer's conduct in the [fol. 1254] Darcy trial since the trial of the confederates had been widely reported not only in the local newspapers and via radio but in nearby Philadelphia newspapers which had a considerable circulation in Bucks County.

President Judge Hiram H. Keller of the Bucks County Court presided at Darcy's trial. He had, at the time, served some eighteen years as president judge.

It may be well at this point to advert to the factual findings which the majority made on the score of Judge Boyer's presence in the courtroom during Darcy's trial:

"Honorable Calvin Boyer was much in and about the courtroom during the course of this trial . . .

" . . . every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session.

"At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although there is nothing to suggest that the jury could hear what was being said.

" . . . at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling.

" . . . during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar . . .

important. We may be persuaded that in the circumstances it would have been wise to take such precautions, yet not be convinced that failure to follow the wiser course was a denial of the essence of a fair trial. The due process concept does not embrace all that a very careful and perceptive judge might do to protect a trial against emotional factors."

I imply no criticism of the newspaper, radio or television coverage of the trial of Darcy's confederates or his own, or of the events which preceded them.

“... the jurors knew who Judge Boyer was. The evidence also makes it very probable that they also knew that he had just completed the trial at which relator's (Darcy's) codefendants had been convicted and sentenced to death. Moreover it had been reported in the press that Judge Boyer had commended the jury for the first degree verdict against the codefendants with its mandatory death penalty.”

[fol. 1255] There was a “rather striking manifestation of extraordinary interest in the (trial) proceedings” by Judge Boyer.

It had come “to the jury's observation that a judge (Judge Boyer) other than the trial judge was showing much interest in the case.” (emphasis supplied).

Despite these significant and critical findings the majority concluded that Judge Boyer's presence and conduct in the Darcy trial fell short of the fundamental unfairness proscribed by the due process guarantee.

It went so far as to declare that “Even if the jurors identified him (Judge Boyer) as an official who was hostile to the relator (Darcy) that would not be enough; . . . it would be necessary to show that he (Judge Boyer) had said or done something prejudicial to the defendant during his stay in the courtroom before the fact of his presence and manifest interest could raise a substantial due process question.”

I disagree with the majority's conclusion.

I believe that if the jurors identified Judge Boyer “as an official who was hostile” to Darcy such identification in and of itself raised a due process question which must be resolved in favor of Darcy, because a “hostile” attitude of a judge can, and almost universally does, effectively influence and guide a jury's verdict.

My opinion is based on intensive observation of juries during the ten years which I spent as presiding judge in the trial of criminal cases before I came to the appellate bench.

I know from first-hand experience how the members of a jury, consciously or subconsciously, are ever on the alert to glean from what a judge has said or done during the

course of a trial his opinion as to the guilt or innocence of a defendant. Jurors look, figuratively speaking, to every spoken word, to every nuance and inflection, to every gesture, no matter how slight or unintentional, to the extent [fol. 1256] and tenor of judicial participation in examination or cross-examination, to anything which could conceivably be construed as a straw in the wind as to the judicial "attitude".

The United States Supreme Court, the Supreme Court of Pennsylvania and other appellate courts, have time and again emphasized the existence of this significant judge-jury relationship.

"It is obvious that under any system of jury trials *the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.*" *Starr v. United States*, 153 U.S. 614, 626 (1894); *Quercia v. United States*, 289 U.S. 466, 470 (1933).⁶ (emphasis supplied).

The Supreme Court of Pennsylvania has similarly appraised the judge-jury relationship, stating, in the leading case of *Commonwealth v. Myma*, 278 Pa. 505, 508 (1924): "The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance, and from whom the litigants expect absolute impartiality. An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table. To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice. It has a tendency to take from one of the parties the right to a fair and impartial trial, as guaranteed under our system of jurisprudence." To the same effect see *Commonwealth v. Trunk*, 311 Pa. 555, 566 (1933); *Sorrentina v. Graziano*, 341 Pa. 113, 119 (1941); *Schlessinger Petition*, 367 Pa. 476 (1951); *Commonwealth*

⁶ We applied the principle stated in *United States v. Link*, 202 F.2d 592, 595 (1953).

v. Claiborne, 175 Pa. Sup. Ct. 42, 50 (1953)⁷ (emphasis [fol. 1257] - Evidencing its insistence upon strict conformity with these expressed standards governing judicial office, the Supreme Court of Pennsylvania has held that their breach constitutes a deprivation of "due process".

It did so in DiBona, Adm'r. v. Philadelphia Transportation Company, 356 Pa. 204, 216 (1947), stating: "Judges should never forget that 'the first and most essential element in a jury trial is a wise, learned, impartial and competent judge'. See Martin et al. v. Phila. Gardens, Inc. 348 Pa. 232, 236 . . . and Com. v. Brown, 309 Pa. 515, 521 . . . *A litigant who is denied this 'essential element' is deprived of 'due process of law'.*" (emphasis supplied).

It may be said that the foregoing is inapposite in the instant case because Judge Boyer was not the "presiding judge" at Darcy's trial. On that score it need only be pointed out, as the majority found, that Judge Boyer time and again "sat" on the bench with Judge Keller during the course of the trial and that he "at times . . . joined Judge Keller on the bench for whispered consultations within view of the jury" and further, "at least one such consultation was designed for the *guidance of Judge Keller in the making of a trial ruling.*" (emphasis supplied).

Coming now to the majority's statement that in the absence of proof that "Judge Boyer had said or done something prejudicial during his stay in the courtroom", there could be no finding of denial of due process:

In my opinion the record more than amply demonstrates that Judge Boyer "had done something prejudicial" to

⁷ The United States Court of Appeals for the Second Circuit in United States v. Brandt, 196 F.2d 653, 656 (1952) expressed a similar view with reference to the judge-jury relationship, stating: "*Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury or laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence.*" (emphasis supplied). (emphasis supplied).

Darey. The majority's own finding of his "rather striking manifestation of extraordinary interest in the proceedings" and its implicit recognition of the jury's identification of Judge Boyer as "hostile" establish that Judge Boyer "had done something prejudicial".

[fol. 1258]. If more is needed the record supplies it.

The jury "knew" who Judge Boyer was. They "knew" he had presided at the trial of Darey's confederates and they knew that he had praised the jury for finding them guilty and sentencing them to death.⁸ They "knew" Judge Boyer "was showing much interest in the case". They "knew" the extent of his "interest from the fact that he was in daily attendance at the trial and that "he even attended an evening session". They "knew" it from the fact of his "whispered consultations" with Judge Keller and they "knew" it from the fact that he sat, hours at a time, in a specially-placed chair on the front row, directly facing the jury and within its view.

Sitting there in that chair, staring the jury in the eye, as it were, Judge Boyer was to it an uncompromising watchful omnipresence; a stern sentinel of justice; an "overseer judge" over the jury itself, dedicated to the meting out of the fullest measure of penalty to the defendant; a silent but eloquent extra-judicial aid to the prosecuting attorney.

I cannot conceive of a more striking example of judicial "guiding" of a jury's verdict—I refer particularly to the jury's imposition of the death sentence—than was so glaringly apparent in the instant case. It falls squarely within the reach of the prevailing rule proscribing undue judicial influence on a jury, and constituted fundamental unfairness violative of the due process clause. *DiBona, Adm'r. v. Philadelphia Transportation Company*, supra.

The duty of this court to give consideration to the "totality of facts in a given case" where the due process clause is invoked, was clearly spelled out by the Supreme Court of the United States in *Betts v. Brady*, 316 U.S. 455 (1942). (emphasis supplied).

⁸ The voir dire examination of the jurors in the Darey case disclosed that 89 percent of them had read the newspaper accounts of the trial of Darey's confederates.

"The phrase (due process) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights [Vol. 1259] Its application is here a matter of rule. A asserted denial is to be tested by an assessment of the totality of facts in a given case (pp. 465-66)

"As we have said, the Fifth Amendment prohibits the conviction and imprisonment of one without due and fundamental ideas of fairness and right . . . (pp. 465) emphasis supplied)

Again, in *Johnson v. Zerbst*, 304 U.S. 458 (1938). The Supreme Court said (pp. 465-66)

"True, *habeas corpus* cannot be used as a means of reviewing errors of law and the question of jurisdiction—occupying during the course of trial; and the writ of *habeas corpus* cannot be used as a writ of error. *Habeas corpus*, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in *habeas corpus* proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment." (emphasis supplied) ⁹

I come now to the alleged note-passing incident which the majority indicated it would have considered "such improper partisan participation by Judge Boyer in the trial" as to come within the reach of the due process clause had it been established by the evidence.

⁹ "As applied to a criminal trial *denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.*" *Lisenba v. California*, 314 U.S. 219, 236 (1941) (emphasis supplied).

during the course of Judge Keller's charge they did not sit [fol. 1261] at their customary places at the Commonwealth's counsel table which was about four feet or so from the jury, but instead sat at the press table some 15 feet distant (on the opposite side of the room); the chairs in which they sat

but my recollection is that we were there for a major part of the charge.

* * * * *

“Q. Do you have any recollection of Judge Boyer being present in the courtroom during any portion of the charge?

“A. I have not.

* * * * *

“Q. There has been testimony to the effect that during the charge a note was written and passed by Judge Boyer to you. Now, do you have any recollection of any such incident?

“A. No recollection whatsoever.”

“Testimony of Assistant District Attorney Curtin—
N. T. pp. 713-14-15, 21:

“Q. How far was the Commonwealth's table from the nearest juror?

“A. The front of the Commonwealth's table would be about four to five feet from the front of the nearest juror—the front of the chair of the nearest juror.

“Q. And how far was it from the Commonwealth's table to the strike that. Was there a table to the rear of the Commonwealth's table?

“A. There was.

“Q. And what was the purpose of that table?

“A. That was a table where the reporters constantly sat and where they were seated during this trial when they were there.

* * * * *

“Q. Can you give us any estimate of the distance between the Commonwealth's table and the table which, I believe, you have referred to as being used by members of the press?

“A. I would say there was at least fifteen feet separating those two tables.”

at the press table were some eight feet or so away from the "special chair" reserved for Judge Boyer's use; they had "no recollection" whether Judge Boyer was at the time seated in his chair; they had "no recollection" whether Judge Boyer had passed a note to the district attorney as testified to by the relator's witnesses.

"Q. Now, Mr. Curtin, do you recall where Mr. Biester was seated during the charge of the Court?

"A. To the best of my recollection, sir, both Mr. Biester and I were seated in two of the chairs in the first of the two rows of chairs which were immediately in front of the reporters table.

* * * * *

"Q. Do you recall whether there was anyone sitting at the Commonwealth's table during the charge of the Court?

"A. I believe that I went to it for a few minutes but, to the best of my recollection, the Commonwealth's table had no one seated at it during most of Judge Keller's charge.

"Q. Do you recall seeing Judge Boyer in the courtroom during the Court's charge?

"A. I have no recollection whatsoever of Judge Boyer being in the courtroom during the charge of Judge Keller.

"Q. Do you have any recollection of any note having been handed by Judge Boyer—to Mr. Biester at any time during the charge of the Court?

"A. I have absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the charge of the Court?

* * * * *

"Q. Now what you call the reporters table, is that the one that is between your table and the body of the courtroom?

"A. No, you are pointing to the defendant's table there.

"Q. Defendant's table, all right. Then the reporters table was here—you said some distance—I think you said about eight feet from the chair marked 'Judge Boyer'?

"A. About eight feet from the front of the chair marked 'Judge Boyer' to the back of the chair behind the reporters table; eight or ten feet."

[fol. 1262] The district attorney also testified that he had "no recollection" as to whether Judge Boyer had "assisted him" in the Darcy trial.¹²

It was on the basis of this "no recollection" testimony that the District Court Judge made the factual finding that the note-passing incident had *not* occurred and that Judge Boyer had not at any time assisted the district attorney.

In my opinion, in a case where a man's very life is at stake, *non-negating* testimony such as was given by the district attorney and his assistant cannot be regarded as affording "substantial" basis for a fact-finding such as was made by the District Court in the instant case.¹³

One cannot simply shrug off with a "no recollection" statement affirmative testimony of such an extraordinary event as the passing of a note by a judge to a prosecuting attorney in a murder trial.

Note-passing by a judge, to a district attorney, can scarcely be regarded as a casual, routine, every-day, run-of-the-mine occurrence. The implication of such an occurrence could scarcely escape an experienced prosecuting attorney and the event would have been indelibly inscribed upon his memory. But curiously here the district attorney had "no recollection" as to whether *it had happened or had not happened*. And even more curiously, lightning seems to have struck twice, because the assistant district attorney who was admittedly sitting by his side also has

¹² N. T. p. 896:

"Q. At any time during the Darcy trial did Judge Boyer assist you in any way in the presentation of the evidence in the trial of the case?

"A. I have no recollection of such a situation at all, Mr. Van Artsdalen."

¹³ The testimony disclosed that it was Zeitz, one of Darcy's confederates who had killed the deceased by one of two bullets which he fired in the course of their "get-away" from the scene of the hold-up; that Darcy had not fired his gun at the time. Darcy then was 22 years old. These facts, it is urged, might have been taken into consideration by the jury—at least to the extent of imposing a life sentence—had it not been "coerced" by Judge Boyer.

“no recollection” whether it had happened or had not happened.

[fol. 1263] It seems to me that the thread of a man's life, no matter how “heinous” his crime, should not be snapped asunder by the erratic, dulled blade of “no recollection”.

My resolution in this respect is reinforced by the admitted but unexplained circumstance that the district attorney and his assistant, when the trial judge began his charge to the jury, saw fit to leave their customary places at the Commonwealth table, close to the bench and only four feet from the jury, and to seat themselves some 15 feet away at the press table, which, as they said, was some eight feet from “Judge Boyer's chair”.

In conclusion I will dwell but briefly with the majority's view that Judge Boyer's conduct was an “occurrence—in state procedure”, immune, as such, from the reach of the due process guarantee. Implicit in the majority's discussion on this score¹⁴ is its recognition that Judge Boyer's conduct was “dubious” and its indication that it would have “proscribed” it had it happened in a trial in a federal court and would have considered it as a compelling basis for granting a new trial.

Shaken down to its hard core the majority's position—bluntly stated—is this: Darcy was grievously hurt by Judge Boyer's conduct but we cannot help him because he was hurt on the other (the State) side of the street; otherwise stated, there is no constitutional redress for Darcy despite the fact that he was unfairly tried because it was his fate to be tried in a State court instead of a Federal court.

I do not agree.

I cannot draw as fine a line as the majority has drawn when the terminus of that line is death.

The mere circumstance that what happened to Darcy

¹⁴ “It is established constitutional doctrine that our limited function in correcting fundamental impropriety in state trials challenged under the due process clause makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court.”

occurred in a State and not in a Federal court cannot operate to deprive him of his constitutional rights.

[fol. 1264] Judge Boyer's extraordinary and unprecedented conduct was totally foreign in every respect to the normal procedural course of a criminal trial in the Pennsylvania courts. It was not in any sense within the periphery of what may be described as the customary and normal procedure in Pennsylvania criminal trials. Its significance in its compelling impact upon the jury was of such proportion and vitality as to take it out of the category of "state procedure".

It is not incidental to any accepted standard of state procedure for a judge to conduct himself as Judge Boyer did in the Darcy trial. It is not incidental in Pennsylvania for a judge who has just completed a trial of a defendant's confederates and praised the jury which found them guilty and fixed death as their penalty, to participate, as Judge Boyer did, in the trial of a third confederate, presided over by the president judge of this court. It is not incidental for a judge to have a "special chair" placed for his use on the front row of the courtroom where he is in full view of the jury and it is within his full view and for him to sit there as an extra-curricular judicial overseer.

And it is not incidental in Pennsylvania criminal trials for a judge "to pass a note" to the district attorney.

In my opinion it can fairly be said of Judge Boyer's conduct that "This is conduct that shocks the conscience" in violation of the due process guarantee.¹⁵

Its inevitable effect was to distort the trial process to the extent at least that Darcy was deprived of a possible unprejudiced jury determination that justice required only the imposition of a life sentence instead of death.¹⁶

Of Judge Boyer's conduct it can also be said, as the Supreme Court of the United States said in *Chambers v. Florida*, 309 U. S. 227 (1940):

"... no man's life, liberty or property (can) be forfeited as criminal punishment . . . until there has [fol. 1265] been a charge fairly made and *fairly tried* in

¹⁵ *Rochin v. California*, 342 U. S. 165, 172 (1952).

¹⁶ See Note 13.

a public tribunal *free of prejudice, passion, excitement and tyrannical power*." (pp. 236-37)

* * * * *

"Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." (p. 241) (emphasis supplied).

Upon consideration of the "totality of facts", evidenced by the Darcy trial record, as directed by the Supreme Court of the United States in *Betts v. Brady*, supra, and applying the rule there stated that "... the Fourteenth Amendment prohibits the conviction ... of one whose trial is offensive to the common and fundamental ideas of fairness and right",¹⁷ I am of the opinion that the judgment of the District Court should be reversed and the prayer of the relator granted.

McLaughlin, Circuit Judge, authorizes me to state that he concurs with the views expressed in the foregoing dissent.

Biggs, Chief Judge, dissenting:

On reviewing the record in this case I cannot avoid an abiding conviction that the judicial process under which

¹⁷ In *Buchalter v. New York*, 319 U. S. 427, 429 (1943) the late Mr. Justice Roberts stated the applicable rule as follows:

"The due process clause of the Fourteenth Amendment requires that action by a state ... must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'."

To the same effect see *Rochin v. California*, 342 U. S. 165, 169 (1952) wherein it was stated:

"Due process is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', *Snyder v. Mass.*, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty', *Palko v. Conn.* 302 U. S. 319, 325 . . ."

Darcy was tried was so distorted by circumstances, both in and out of the courtroom, as to result in fundamental unfairness. The brutal crime committed by Darcy, Foster, Zeitz and Capone had angered the citizens of Bucks County. [fol. 1266] By editorials, news stories and comments the press prejudged Darcy's case and prejudiced the minds of the citizenry against him. I cannot believe that all members of the jury remained uninfluenced by these publications.

Though Darcy had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, 19 P. S. Pa. § 75, the severance was rendered worthless when his trial was proceeded with only three days after that of Foster and Zeitz. Under the circumstances a change of venue or a delay in putting Darcy on trial was requisite to fairness.

Judge Boyer's preoccupation with Darcy's trial was intense. He had been on the bench for many years and was a man of great weight in the community. He had complimented the jury at the close of the trial of Foster and Zeitz for imposing the death penalty and this fact had been widely publicized immediately preceding the commencement of Darcy's trial. From his repeated visits to and his behavior in the courtroom the members of the Darcy jury, with reason, could have inferred that he desired to indicate his belief and his desire that Darcy, like Foster and Zeitz, should be found guilty and that the penalty of death should be imposed upon him by the jury: that such was the belief and the desire of the judicial authorities of Bucks County. Though in theory a judge does not control the decisions of juries, judicial attitudes have great influence on jurors. Fairness cannot condone Judge Boyer's conduct.

The foregoing amounts to a denial of due process. A writ of habeas corpus should issue in this case and Darcy should be granted a new trial. The grant of the writ will not prevent him from being tried again for he cannot successfully plead double jeopardy.

[fol. 1267] IN UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 11,564

UNITED STATES OF AMERICA, ex rel. DAVID DARCY, Appellant,
vs.

EARL D. HANDY, Warden of Bucks County Prison; DR. FRED
S. BALDI, Warden of Western State Penitentiary, Rock-
view; and Carl N. Fleckenstine, United States Marshal
for the Middle District of Pennsylvania

On Appeal from the United States District Court for the
Middle District of Pennsylvania

Present: Biggs, Chief Judge, and Marris, Goodrich, Mc-
Laughlin, Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—June 9, 1955

This cause came on to be heard on the record from the
United States District Court for the Middle District of
Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and ad-
judged by this Court that the judgment of the said District
Court in this case be, and the same is hereby affirmed, with
costs.

Attest: Ida O. Creskoff, Clerk.

June 9, 1955.

[File endorsement omitted.]

[fols. 1268-1291] Petition for rehearing covering 24 pages
filed June 23, 1955, omitted from this print. It was denied
and nothing more by order, July 11, 1955.

[fols. 1292-1294] IN UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed July 11,
1955

After due consideration the petition for rehearing in the
above-entitled case is hereby denied.

Biggs, Chief Judge, and McLAUGHLIN and KALODNER,
Circuit Judges, dissent.

By the Court William H. Hastie.

Dated: July 11, 1955.

[File endorsement omitted.]

[fol. 1295] IN UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—Filed July 15, 1955

After due consideration of the appellant's motion for
stay of mandate in the above-entitled case,

It is ordered that issuance of the mandate in the above-
entitled cause be and it is hereby stayed until August 15,
1955.

By the Court, William H. Hastie, Circuit Judge.

Dated: July 15, 1955.

[File endorsement omitted.]

[fol. 1296] Clerk's certificate to foregoing transcript omit-
ted in printing.

[fol. 1297] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1955.

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 24, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5942-8)